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SUPREME COURT, U. S.

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1973

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DENIS HANLY, SIEN WEI LIU, IRVING ZUCKERMAN, FRANK MOSCO, COVELLE N. BURBANK, DENNIS SULLIVAN, and MARIE BEAULIEU on behalf of themselves and all others similarly situated,

Petitioners,

vs.

RICHARD C. KLEINDIENST, as Attorney General of the United States: ROBERT L. KUNZIG, as Administrator of General Services of the United States, NORMAN A. CARLSON, as Director of Federal Bureau of Prisons and UNITED STATES OF AMERICA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, AND APPENDIX

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STATEMENT

The petitioners, by their attorney, Alfred S. Julien, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this proceeding on September 10, 1973.

OPINION BELOW

The opinion of the Court of Appeals is reported at 484 F 2d 448

JURISDICTION

The judgment of the Court of Appeals was entered on September 10, 1973, and this petition for certiorari was filed

within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C., section 1254(1).

QUESTIONS PRESENTED

1. Does the language in the National Environmental Policy Act (NEPA, section 102 (2)(C), 42 U.S.C. section 4332 (2) (C)),"major Federal actions significantly affecting the quality of the human environment" (which require environmental impact statements), constitute a single-test standard: i.e., the use of both "major" and "significantly affecting", etc., is

merely for emphasis, as many circuit courts of appeal and district courts throughout the country hold; or does the quoted language constitute a two-test standard: i.e., "major" and "significantly affecting", etc., are separate independent operative elements, as the Court of Appeals below, other circuit courts of appeal and other district courts throughout the country hold?

2. In light of the fact that "statutes heretofore enacted relating to the prevention, abatement and control of environmental pollution, water and land resources, transportation, and

economic and regional development", are statutes "which provide for the enhancement of environmental quality" (Environmental Quality Improvement Act, EQIA, see 202,(b)(1), 42 U.S.C. sec. 4371 (b) (1)),enacted April 3, 1970, and the Intergovernmental Cooperation Act (ICA, sec. 401, 42 U.S.C. sec. 4231), enacted October 16, 1968, relates to the prevention, abatement, and control of environmental pollution, water and land resources, transportation, and economic and regional development, and is thus, by law, a statute "which provides for the enhance-

ment of environmental quality" (42 U.S.C. sec. 4371 (b) (1)),is a determination by a federal agency, pursuant to the Intergovernmental Cooperation Act (42 U.S.C. sec. 4231 (a)), that a federal project has "a significant impact on area and community development" (42 U.S.C. sec. 4231 (a)) - a fortiori, a determination that the project may have "a substantial impact on the community"- equivalent to a determination that the project (admittedly a "major federal action") is a "major federal action significantly affecting the quality of the human environment". (NEPA, section 102 (2)(C), 42 U.S.C. sec. 4322 (2)(C)), so that an environ-

mental impact statement must be filed prior to construction (42 U.S.C. sec. 4332 (2) (C))?

3. Where a federal agency conducts a public hearing in order to make a determination affecting the rights of the public, may the agency, following completion of the hearing, and without notice or opportunity to the public to be heard, properly add to the record of the hearing, and base its determination, in naterial part, upon, additional evidentiary material involving issues litigated at the hearing, and disclose said material to the public, for the first time, at the time the agency files its determination?

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth verbatim in the Appendix. The statutes involved, and the respective volumes and pages where they may be found in the official edition, are as follows:

United States Code, Title 5, section 706 (p.225). (The Administrative Procedure Act - Judicial Review).

United States Code, Title 42, sections 420 1(1), (9) and (10). (pp.810-811); and 4231(a),(b) and (e) (pp.816-817) (The Intergovernmental Cooperation Act; ICA) (18a-29a of Appendix)

United States Code, Title 42, sections 4321 (pp. 209-210), 4331 (pp.221-222),

4332(p225-226), 4333 (p.241), 4334 (p.242), 4341 (pp.243-244), 4342 (p. 244), 4344 (pp. 244-245) (The National Environmental Policy Act; NEPA) United States Code, Title 42, section 4371 (p.246) (The Environmental Quality Improvement Act; EQIA).(30a - 50a App.)

The regulations involved are:

The Guidelines of the Council on Environmental Quality (CEQ), which implement NEPA (36 Fed. Reg. 7724-7729; April 23, 1971). (56a-110a: App.)

The Presidential directives which implement ICA (Circular A-95 - Revised - of the Office of Management and Budget in the Executive Office of the President; February 9, 1971). (143a-156a: Appendix).

Executive Order 11514, March 5, 1970; 35 Fed. Reg. 4247. (134a-142a:App.)

General Services Administration (GSA) Order, PBS (Public Buildings Service) 1095-1A, Attachment B. (156a-163a, App.)

* * *

STATEMENT OF THE CASE

a. Facts - This case involves the basic issue of whether the federal government can again circumvent the National Environmental Policy Act (NEPA, 42 U.S.C. Section 4321 et seq.).

The General Services Administration (GSA) is in the process of building a high-rise jail in a crowded area of lower Manhattan. On two separate appeals the Circuit Court has found the erection of the structure to violate NEPA*; yet it has not been enjoined, and is now

* Hanly v Mitchell, 460 F 2d 640, cert. den., 409 U.S. 990, 93 S.Ct. 313, 34 L. Ed. 2d 256 (Mr. Justice Douglas dissenting); Hanly v Kleindienst, 471 F 2d 823; cert. den: 412 U.S. 908, 93 S.Ct. 2290, 36 L. Ed. 2d 974 (1973; Mr. Justice Douglas dissenting).

thirteen (13) stories high.

We contend that now is the time to stop this violation of federal law, and that now is the time to insure that NEPA does not become a congeries of meaningless platitudes which can safely be ignored.

In January, 1972, the Federal Government, without notice to anyone living or working in the area, started to build a jail and office building on a narrow plot of land in back of the Federal Courthouse located in Foley Square, New York City.

Two large apartment buildings are across the street from the jail site, only 150 feet away. They are Chatham Green and Chatham Towers, cooperative apart-

ment houses erected with Title I federal money. Both buildings have terraces, lawns and playgrounds facing the proposed prison and are principally occupied by families. Together they have 660 apartments with approximately 3,000 residents. Both have received awards for architectural excellence. The jail is an ambitious project: it will be 167 feet high, the equivalent of 17 regular stories. It will house approximately 449 prisoners. Some of them will be awaiting trial in the Southern District of New York,the Eastern District of New York (in Brooklyn), and the District of New Jersey (in Newark). Some of the prisoners will be serving

sentences. Others will be enrolled in a community treatment program, and will spend part of every day outside the prison either working or studying, returning to the jail at night. Finally, there will be a community out-patient treatment clinic, where out-patients, including those with drug problems, will come to the jail for treatment.

A separate office building to be built on the same site as the jail, is not involved in the present proceeding. The area around the present Federal Court-house and the site of the new buildings can, without difficulty, be described as crowded and congested. There are numer-

ous buildings used for federal, state and municipal purposes. Streets are narrow. Besides Chatham Towers and Chatham Green, there are other residential buildings close by with a population of at least 50,000 people.

The only pathway to the subway for the citizens of Chinatown and these two apartment buildings is through a narrow 24-foot street, Cardinal Hayes Place. Other means of access have previously been eliminated. Cardinal Hayes Place, which is directly between the new buildings and the present Federal Courthouse, will have two bridges suspended over it, linking the courthouse to the jail, like aerial rabbit's

warrens. After completion of the proposed construction, Cardinal Hayes Place will be shrouded in darkness because of the tall structures on both sides and the bridges across it, and will be frequented by visitors to the prisoners, out-patients, hangers-on, bail bondsmen, and the like.

The construction site is exceedingly small. The whole site is unavailable because of the presence of a New York City Transit Authority electrical substation in the center. Consequently, the government has had to squeeze the jail into the northern part of the site, which happens to be the part closest to

Chatham Towers and Chatham Green. The southern portion of the site will contain the new office building.

Each building will be about 167 feet high, and will be built right up to the property line, thus, incidentally, violating the applicable zoning laws.

Transit facilities in the area are already overcrowded. Parking on the street is for the most part prohibited. There are few parking lots and these are already overtaxed. In fact, allowing for the most charitable estimate, and including lots several blocks away, there are only about 816 parking spaces available for the entire area which already needs about 5000 spaces.

In spite of this egregiously severe parking problem, GSA is not including a garage to handle cars of people using and visiting its new buildings. Thus, we can see that the area already has a serious traffic problem, due to its large population and narrow streets. The jail will have to be supplied by trucks which will move into and out of the area, thus greatly increasing even the present congestion. In addition, there will be vans to and from the courts in Brooklyn and New Jersey, since the jail is going to serve them also. The government, before this case began, failed to comply with NEPA. As shown below, it took the prodding of two

United States Court of Appeals' decisions for the government to do anything in the case. Even after these decisions, the government has shown itself to be committed to going ahead with the jail at all costs, and contrary to NEPA and the courts' mandates. The government's only activity before this case began was to produce a terse letter, dated February 23, 1971, by the General Services Administration, to the effect that the proposed jail "will have no adverse effects on the environment." (This letter is quoted in full in the first Court of Appeals' decision in this case, Hanly v. Mitchell, 460 F.2d 640, 645-646.)

b. Procedural History - Plaintiffs, suing for themselves and all others similarly situated, are residents and businessmen of the area. On February 18, 1972, a few days after excavation had started, preparatory to construction, and as soon as possible after the plans for the jail became known, plaintiffs commenced an action for (a) a judgment declaring that the construction was and is unlawful because of the government's failure to file the required environmental impact statement (42 U.S.C. sec. 4332 (C), and (b) an injunction permanently restraining the construction until such statement was filed. At the same time, plaintiffs sought a preliminary

injunction enjoining further activity, pending compliance with the impact statement requirement. Jurisdiction was and is based on the existence of a federal question (28 U.S.C. Sec. 1331) (a) - that is, a matter in controversy arising under the Constitution and laws of the United States.

After the District Court refused the preliminary injunction, plaintiffs appealed to the Court of Appeals. That Court rejected the government's claim that the February 23, 1971 letter was sufficient compliance with NEPA.[1]

1. Hanly v Mitchell, 460 F.2d 640 (1972) (referred to hereinafter as Hanly I). Hanly v. Kleindienst, 471 F 2d 823, is hereinafter referred to as Hanly II.

The Court remanded the case for a new determination by GSA concerning the question whether the proposed jail significantly affects the quality of the human environment within the meaning of 42 U.S.C. section 4332 (C)(2)The Court concluded that if GSA found that there was such a significant effect, then an injunction would be granted pending GSA's preparation of an impact statement, and compliance with the other NEPA provisions.[2]

Motions in the Court of Appeals and this Court for a stay of construction pending

2 The Hanly I court actually granted an injunction, but stayed its enforcement for a period not to exceed thrity days, pending GSA's new determination.

a petition for a writ of certiorari, were denied.

The petitions for writs of certiorari to review the respective judgments in Hanly I and Hanly II were denied by this Court, with Mr. Justice Douglas in each case dissenting and voting to grant the writ. Hanly v. Mitchell 409 U.S. 990, 93 S. Ct. 313, 34 L. Ed. 2d 256 (1972), and Hanly v. Kleindienst, 412 U.S. 908, 93 S. Ct. 2290, 36 L. Ed. 2d 974 (1973).

On June 15, 1972, only 11 working days after the Court of Appeals/decision in Hanly I, GSA, in purported compliance with the direction of the Court, filed what it called an "assessment of environmental

impact". This purported to decide that the jail did not significantly affect the quality of the human environment, and hence, no impact statement was needed.

GSA's assessment amounted to little more than a rewrite job. There were no discussions or meetings with any government agency, community group, local residents or businessmen prior to the issuance of the assessment. Neither GSA nor any other government agency visited either Chatham Green or Chatham Towers or any of the other buildings in the area. The government even failed to consult with experts who would be qualified to comment on the jail's environmental impact.

Nothing in GSA's assessment refers to t the potential effects of prison riots in a crowded area in downtown New York City. Nothing is said about the effect of the unending procession of inmates, visitors, temporary detainees and out-patients, including those on drug maintenance programs, on the health and safety of the neighborhood. The assessment shows no planning with City and State penal authorities for the purpose of avoiding the construction of the jail entirely, through better ancillary use of city and state jails.

Plaintiffs applied to the District Court for review of the assessment. The District Court held, in an opinion

dated August 8, 1972, that the assessment complied with NEPA, and consequently, no preliminary injunction would issue.

Plaintiffs again appealed, and the Court of Appeals again held that the government had not fully met its obligations. Specifically, the Court directed GSA, after giving notice thereof to the community, to hold a public hearing, to serve the dual purpose of "enabling the agency to obtain all relevant data and to satisfy the community that its views are being considered". Hanly II, 471 F2d 823, 835.

"(B)efore a preliminary or threshold

determination of significance is made", the Court wrote, "the responsible agency must give notice to the public of the proposed major federal action and an opportunity to submit relevant facts which might bear upon the agency's threshold decision". 471 F2d, at p.836. These steps, the Court said, went further than the Court's holding in Hanly I, 460 F2d, at p. 647, "that federal agencies must 'affirmatively develop a reviewable environmental record....even for purposes of a threshold section 102(2) (C) determination'." 471 F2d, at p. 836. Finally, the Court held (471 F 2d, at p. 836):

"In view of the Assessment's failure to make findings with respect to the possible existence of a drug maintenance program at the MCC, the increased risk of crime that might result from the operation of the MCC, and the fact that appellants have challenged certain findings of fact, we remand the case for the purpose of requiring the GSA to make a further investigation of these issues, with directions to accept from appellants and other concerned citizens such further evidence as they may proffer within a reasonable period to make supplemental findings with respect to these

issues, and to redetermine whether the MCC "significantly affects the quality of the human environment". If, as a result of such further investigation, the GSA concludes that a detailed environmental impact statement is required, a preliminary injunction will be granted restraining further construction of the MCC until the agency has complied with the procedures required by Sec. 102 (2) (C) of NEPA. In the event that the GSA reaffirms its initial determination the district court will determine, should a further request be made, whether preliminary injunctive relief is warranted."

Chief Judge Friendly dissented, expressing the view that the construction of the prison entails potentially significant environmental effects (471 F2d 823,829); that, accordingly, GSA should be required to file an impact statement, and, therefore, that an injunction should issue until a reasonable period after the making of said statement. 471 F2d, at pp. 839-840. Plaintiffs moved to recall the mandate of the Court of Appeals, and to stay construction of the Correctional Center pending application to this Court for a writ of certiorari. The application was denied on January 8, 1973.

Plaintiffs, as already indicated, then applied to this Court for a stay of construction of the jail pending the decision on their application for a writ of certiorari. On January 29, 1973 Mr. Justice Marshall denied the stay at that time, but referred the application to the full Court for consideration, along with the petition for writ. Meanwhile, on January 30, 1973, following notice to the community, a public hearing

was held by GSA, at which oral statements were heard, and written statements received, concerning the impact of the jail on the environment (183a-191a).

All the statements were furnished only by or in behalf of plaintiffs and their contention that the proposed construction would significantly affect the quality of the environment, and, in fact, do so adversely. Not one witness appeared, not one statement was received, in support of GSA's contention that the prison will not significantly affect the quality of the environment.

The testimony and documentary evidence

were furnished by experts in the fields of environment, architecture, city planning, psychology, penology, transportation and education, as well as by area residents and businessmen. Dozens of speakers - educators, architects, clergymen, public officials for planning boards, and, indeed, the N.Y. City Board of Education - appeared to give their unanimous view that the Correction Center would significantly affect the quality of the environment, and would, in fact, do so adversely. Herewith some illustrative instances: Melanie Radley, from the New York City Board of Education, School Planning Division, stated that the Board of

Education was not consulted before the jail site was chosen, although the Board was constructing a high school only two blocks away from the site. She characterized the planning of the jail as amounting to subterfuge in concealing the fact that the jail would be placed in its present location. All the construction signs merely refer to a "Courthouse Annex," and are silent as to a jail.

Charles Cogen, former head of the United Federation of Teachers and American Federation of Teachers, stated that the Federal government failed to consider the effect of the jail on a high school which is being built approximately two blocks away from the site.

Those using the school will have to walk past the jail going and coming from the buses and subways.

Rev. Denis Hanly, a pastor of the Transfiguration Church and the lead plaintiff in this case, stated that in this community, the residents have no control over their surroundings. Children must play in the streets because there are no parks. In spite of this, the powers that be have insisted that a jail, which will further imprison the residents as much as its inhabitants, must be built here.

Frank Musco ,who has lived in this area all of his life and is presently the President of the Holy Name Society of

the Church of the Transfiguration in Chinatown, stated that in the past few years, prior to the construction of the jail, this area was finally being upgraded. Chatham Green and Chatham Towers were built, the streets were rebuilt, and open spaces were provided. However, now the redevelopment of the area has stopped, and the jail is going to cause the community to lapse into its former state.

Dr. Lawrence Abt, a psychologist, testified that the jail would have a real, adverse effect on the social and psychological climate of the community. Social mobility will be inhibited. There will be a feeling of impaired safety. The tension level will signif-

icantly increase.

Alfred J. Marston, an economist, traffic expert and civic leader, stated that the residents of Chatham Towers were enticed into the civic area with the promise of good neighborhood design, open spaces, and buffers between the residents and the civic center, /which now includes the jail. All of this is being ignored by the jail builders. He said:

> "From a professional point, being associated for the past 15 years in the planning of transportation facilities and studying the effect of transportation on neighborhoods, I must state that no adequate access roads have been planned for this prison complex, neither have public transportation facilities. The only

subway station, Worth Street-Brooklyn Bridge, is already inadequate to handle the passenger load at peak hours. As far as the present vehicular traffic densities affecting the neighborhood, I refer you to the study made by the City's Environmental Agency, which shows that the density of noxious gases from automobile vehicles in this area - Worth, Chambers and Canal Streets - is the worst in the city of New York. Forcing an additional number of vehicles in this neighborhood, be it with prisoners or other interested parties, will result in further contamination and deterioration of the neighbor-

hood's air and create traffic congestion."

Amy Bloch, an architect, stated that the jail violated the Civic Center plan. This plan provides for malls, parks, and open spaces around the Federal Courthouse. It was put into effect by the City of New York after much study and consultation, for the benefit of the inhabitants of the whole city, and obviously of this area. The whole purpose of having a Civic Center Plan is to avoid the haphazard placement of buildings which New York suffered before urban planning became popular.

GSA's EX PARTE ADDITIONS TO THE RECORD OF THE PUBLIC HEARING, WHICH ADDITIONS FORMED THE BASIS, IN MATERIAL PART, OF GSA's SUBSEQUENT DETERMINATION THAT THE JAIL WOULD NOT SIGNIFICANTLY AFFECT THE QUALITY OF THE ENVIRONMENT, AND WHICH WERE FIRST DISCLOSED TO THE PLAINTIFFS SIMULTANEOUSLY WITH SAID DETERMINATION .

The public hearing was held and completed on January 30, 1973. On April 3, 1973 - following the filing on March 2, 1973 of plaintiffs' petition to this Court for a writ of certorari to review the judgment in Hanly II, 471 F. 2d 823, but prior to the filing of plaintiffs' reply brief on May 14, 1973 - GSA filed with the District Court, and furnished

plaintiffs' counsel with a copy of, its determination and supplemental findings (183a-191a). At that time, plaintiffs learned, for the first time, that subsequent to the hearing, GSA, without notice to plaintiffs, made certain evidentiary additions to the record, which additions formed the basis, in material part, of GSA's determination that the Correction Center would not significantly affect the quality of the environment.

These additions-consisting of correspondence between GSA and the architects for the project, between

GSA and the nearby Beekman-Downtown Hospital, including a so-called Hospital Impact Statement; a newspaper report concerning the project, and its proposed uses; crime statistics of the New York City Police Department; a so-called "Inmate and Inmate-Visitor Traffic Statement", etc. - contain evidence relative to such vital environmental questions, litigated by plaintiffs vis-a-vis GSA, as the effect of the construction on light and air, the effect of closing off one street and parts of two others, compliance or non-compliance with zoning

principles, impact on the care rendered by a nearby hospital, effect on crime in the area, architectural divergences of the construction from the surrounding civic building, etc., etc., etc., etc.

Said evidence, as already noted, constituted the predicate, in material part, of GSA's determination adverse to plaintiffs. Plaintiffs not only were not aware of the evidence,nor of the role it would play in GSA's decision-making process, but were, moreoever, deprived of an opportunity to controvert it.

THE INTERVENING DECISION OF THIS COURT DENYING PLAINTIFFS CERTORARI FROM HANLY II, 471 F. 2d 823.

On May 21, 1973, this Court denied certiorari from Hanly II (471 F. 2d. 823). 412 U.S. 908, 93 S. Ct. 2290, 36 L. Ed. 2nd 974, Mr. Justice Douglas dissenting.

THE SUBSEQUENT PROCEEDINGS BEFORE THE DISTRICT COURT

Following the filing of GSA's determination and supplemental findings of April 3, 1973, and the Court's denial of certiorari from HANLY II on May 21, 1973, plaintiffs, challenging the validity of GSA's determination, moved in the District

Court for an order -

a) preliminarily enjoining defendants from continuing with the construction of the jail; or, in the alternative,

b) directing an immediate hearing on the issue of plaintiff's entitlement to said injunction.

Defendants moved for partial summary judgment, pursuant to Rule 56 (b) of the Federal Rules of Civil Procedure, dismissing plaintiffs' cause of action for injunctive relief.

The District Court, in a memorandum, denied plaintiffs' motion and granted defendants' motion.

SUBSEQUENT PROCEEDINGS IN THE COURT OF APPEALS

Plaintiffs appealed to the Court of Appeals, and that Court, on September 10, 1973, affirmed the determination of the District Court. 484 F. 2nd 448. The judgment and opinion of the Court of Appeals are set forth in the Appendix. (1a-13a).

REASONS FOR GRANTING THE WRIT

a. The rationale underlying the three successive holdings of the Court of Appeals in the Hanly cases - involving the construction of the key language of NEPA - is, along with the identical rationale adhered to by other courts of appeal of other circuits, as well as numerous district courts, in conflict with the wholly different and, in fact, opposite rationale adopted and followed by still other circuit courts of appeal and district courts. The conflict - which, it is respectfully submitted, should be resolved by this Court (Stern and Gressman, Supreme Court Practice -4th Ed;1969-sec. 4.4, pp. 154-158; sec. 4.8, - pp. 161-163) - revolves about the question whether the language

in NEPA, "major Federal actions significantly affecting the quality of the human environment"(requiring an environmental impact statement; U.S.C.A., section 4332 (a) (C)), constitutes a two-test standard - i.e., (1) is the action "major"? and (2) does it "significantly affect the quality of the human environment"? - or is it a unitary or single-test standard, "major" and "significantly" etc. being used together for emphasis? See Anderson, Frederick R, "NEPA In The Courts, A Legal Analysis of the National Environmental Policy Act" (Resources for the Future, Inc; Washington D.C.; 1973, published after May 2, 1973; p. 308, footnote), pp. 89-96.

The Court of Appeals in the Hanly cases

subscribes to the view that the quoted statutory language represents a two-test standard. Specifically, in Hanly I, 460 F 2d, at p. 644, the Court held that "major federal action"

> "...refers to the cost of the project, the amount of planning that preceded it, and the time required to complete it, but does not refer to the impact of the project on the environment. We agree with defendants that the two concepts are different and that the responsible federal agency has the authority to make its own threshold determinations as to each in deciding whether an impact statement

is necessary"*

Hanly II, 471 F 2d 823, also adopts the two-test standard. 471 F 2d, at p. 830. Similarly, Hanly III (Hanly v. Kleindienst), 484 F 2d 448, albeit sub silentio.

Other determinations adhering, like the Hanly holdings, to the dual-concept test or standard, and commented upon in Anderson, NEPA In the Courts (Resources For the Future Inc; Washington, D.C.; 1973), pp. 92-96, are:

* Curiously enough, the Court cites Citizens for Reid State Park v Laird, 336 F Supp. 783 (D.Me; 1972) for its conclusion. Citizens for Reid State Park, however, embraces the unitary or single-test standard.

Natural Resources Defense Council v Grant, 341 F Supp. 356, 366 (E.D.N. Car; 1972)

Scherr v Volpe, 336 F. Supp. 882 (W.D. Wisc. 1971) affd. 466 F 2d 1027, 1033 (7 Cir. 1972)

Goose Hollow Foothills League v Romney, 334 F Supp. 877 (D. Ore; 1971)

SCRAP v United States, 346 F Supp. 189, 199, reversed on other grounds, 409 U.S. 1073, 93 S Ct. 2405, L.Ed.2d

Save Our Ten Acres v Kreger, F Supp 2 Env. Law Rep. 20305 (S.D. Alaska), reversed, F 2d 3 Env. Law Rep. 20041 (5th Cir. 1973).

Jicarilla Apache Tribe of Indians v Morton, F Supp. ,2 Env. Law Rep. 20287 (D. Ariz; 1972), affd. F 2d 3 Env. Law Rep. 20045 (9th Cir. 1973).

McLean Gardens Residents Assn. v. National Capital Planning Commission, F Supp., 2 Env. Law Rep. 20659 (D.D.C.), motion for stay of injunction and summary reversal denied, F 2d 2 Env. Law Rep. 20662 (D.C. Cir 1972)

Sierra Club v Mason, 351 F. Supp. 419 (D. Conn. 1972), F. Supp. 3 Env. Law Rep. 20321 (D. Conn. 1973)

Maddox v. Bradley, 345 F. Supp. 1255 (N.D. Tex 1972)

Courts that have, unlike the Hanly court and the courts involved in the foregoing cases,

adopted the unitary or single-test standard,/as noted in Anderson, NEPA In The Courts, supra, pp. 89-92, are:

(explained, p. 44, supra).

Citizens for Reid State Park v Laird, supra, 336 F. Supp. 783, 788 (D. Me. 1972).

Virginians for Dulles v Volpe, 344 F Supp. 573, 578 (E.D. Va. 1972)

Izaak Walton League of America v Schlesinger, 337 F. Supp. 287, 295 (D.D.C), court-approved settlement, F Supp 2 Env. Law Rep. 20039 (D. D.C. 1971)

Citizens for Clean Air v Corps of Engineers, 349 F. Supp. 696 (S.D. N.Y. 1972)

Conservation Society of Southern Vermont v Volpe, 343 F Supp. 761, 767 (D. Vt. 1972).

City of New York v United States, 337 F. Supp. 150 (E. D. N.Y.), 344 F. Supp. 929 (E.D. N.Y. 1972).

Hirom Clarke Civic Club v Romney, F. Supp. 2 Env. Law Rep. 20362 (S.D. Tex. 1971), affd. sub. norm. Hiram Clarke Civic Club v Lynn, F 2d 3 Env. Law Rep. 20287 (5th Cir. 1973)

Pizitz v Volpe,
F. Supp. 2 Env. Law
Rep. 20378 (M.D. Ala), affd.
467 F 2d 208 (5th Cir.
1972), mod. on rehearing,
467 F 2d 208 (5 Cir. 1972)

Maryland-National Capital
Park & Planning Commission
v United States Postal Service,
349 F. Supp. 1212 (D.C.C. 1972).

Sierra Club v Hardin, 325
F. Supp. 99 (D. Alaska; 1971)

From all the foregoing, we see that there is a serious conflict among courts of appeal of different circuits, among courts of appeal and district courts, and among district courts, as to the precise meaning of the language in NEPA, "major federal actions significantly affecting the quality of the environment" (42 U.S.C.A. sec.

4332 (2) (C)),which require environmental impact statements. Some courts construe the words as imposing a unitary or single-test standard (explained, p.44, supra), other courts interpret the words as a two-test standard - i.e., (1) is the action a major one?; and (2) does the action significantly affect the quality of the human environment?

In view of the conflict among the courts of appeal and the district courts, throughout the country, the recurrent nature of the conflict, and the obvious importance of the issue involved in the conflict, basic to the enforcement of NEPA - federal projects and programs in great numbers are being spawned daily - it is respectfully submitted that this Court should grant

certiorari to remove uncertainty from the enforcement of NEPA, to settle the question once and for all, and to bring uniformity to the burgeoning case law relating to NEPA. Stern & Gressman, Supreme Court Practice (4th Ed; 1969) Sec. 4.4, pp. 154-158; sec. 4.8, pp. 161-163).

Reasons for granting
the writ (continued).

b. GSA has, in an environmental determination - as it has, and continues to this day to do, in numerous other environmental determination, involving other projects, along with other federal agencies - in effect aknowledged that the project involved herein (the prison) significantly affects the quality of the human envirnment. 42 U.S.C., sec. 4332 (2) (C). Nevertheless, GSA has - as it has and continues to this day to do, in the case of other projects, along with other federal agencies- failed to file the required environmental

impact statement. 42 U.S.C. sec. 4332 (2)(C). Specifically, on August 20, 1971, GSA, in identical letters to Govenor Rockefeller and Mayor Lindsay, notified said officials of the plan to construct the project, furnished some details concerning it, and stated that the notification was being given because

> "The Intergovernmental Cooperation Act of 1968, and Administrative Directives of the President direct that there be consultation with the appropriate officials in the planning of any federal project which may have a substantial impact on the community. Therefore, we would

appreciate your cooperation and comments in this endeavor" (164a - 169a, see 167a-168a; and 170a-174a, see 173a, Appendix).

The Intergovernmental Cooperation Act of 1968 (ICA), referred to in each letter, is Chapter 52 of Title 42 U.S.C., secs. 4201-4244. It became effective October 16, 1968.

Section 4231 of 42 U.S.C. is concerned with, among other things, the enhancement of environmental quality, dealing, as it does, with, among other things, the prevention, abatement and control of environmental pollution, water and land resources, transportation,

and economic and regional development. See sec. 4231 (a) (1) through (7). Statutes relating to such matters are deemed, by law, to be statutes which "provide for the enhancement of environmental quality". 42 U.S.C. sec. 4371 (b) (1). This section is part of the Environmental Quality Improvement Act (EQIA), which is chapter 56 of Title 42. Thus, ICA is an environmental policy statute.

Section 4231 (a) of 42 U.S.C. (ICA) - pursuant to which, as we see in a moment, GSA's letters to Governor Rockefeller and Mayor Lindsay were written - provides that the President shall establish rules and regulations

governing, inter alia, federal programs and projects "having a significant impact on area and community development", and that said rules and regulations shall provide for full consideration of the concurrent acheivement of specified environmental objectives, such as appropriate land uses, proper development of natural resources, safe disposal of wastes, etc. See 42 U.S.C. sec. 4231 (a) (1) through (7).

The Presidential rules and regulations, or directives, implementing ICA, are set forth in Circular No. A-95 (revised; February 9, 1971), set out in the Appendix (142a-156a). That Circular, among other things, requires

that federal agencies planning construction must consult with, among others, Governors and other local elected officials at the earliest practicable stage in the planning of the project, concerning the relationship of the plan to the development plans and programs of the State, region or locality in which the project is to be located. (154a-156a).

Pursuant to the Intergovernmental Cooperation Act (ICA) and the Presidential directives thereunder, as GSA's letters to Governor Rockefeller and Mayor Lindsay expressly note (167a-168a, and 173a), GSA, as already indicated,

notified these officials of the contemplated construction, because, as the letters stated, the Act (ICA) and Presidential directives direct that there be consultation with the appropriate officials in the planning of "any federal project which may have a substantial impact on the community". GSA's language, "substantial impact on the community", is stronger and more far-reaching then the language of the Act (42 U.S.C. sec. 4231 (a)), pursuant to which the letters were written. The Act refers to federal projects having "a significant impact on area and community development".

Since 42 U.S.C. sec. 4231 is, as we have seen, because of its preoccupation with environmental objectives, a statute which, by law, is deemed to be a statute "which provides for the enhancement of environmental quality" (42 U.S.C. sec. 4371 (b) (1)), it follows that GSA's determination in its letters to Governor Rockefeller and Mayor Lindsay, that the project may have "a substantial impact on the community", necessarily means that the impact must be one which enhances the quality of the environment. That being so, the determination, although made under the Intergovernmental Cooperation Act, also constitutes, in effect, a determina-

tion that the project - which GSA has conceded is a "major federal action" (Hanly I 460 F 2d 640, 644) - is a major federal action "significantly affecting the quality of the human environment", within the meaning of those words in NEPA, 42 U.S.C. sec. 4332 (2) (C)). This is so because things equal to the same thing are equal to each other.

See comparative table showing a) interrelationship of ICA, the Presidential directives thereunder, EQIA, NEPA, and the Guidelines of the Council on Environmental Quality, and b) the virtual identity of the environmental concerns, standards and goals of the above named statutes and regulations.

In view of these facts, GSA was and still is required, prior to commencing or continuing construction, to file the required environmental impact statement. 42 U.S.C. sec. 4332 (2) (C). Needless to say,GSA has not done so.

The Court of Appeals below held that GSA's letters to Governor Rockefeller and Mayor Lindsay did not and do not constitute an admission of significant impact on the community, but rather refer to "any project which may have a substantial impact on the community" (11a). We respectfully submit that the Court of Appeals misconceived the import of the quoted language, and that the language

refers specifically to the project involved herein, since, the letters, as they clearly indicate, were written with reference to this particular project, and for the purpose of getting the approval and cooperation of the officials addressed, with respect to this particular project.

The Court of Appeals, in support of its conclusion that the quoted language did not and does not constitute an admission by GSA of significant impact on the community, referred to 40 U.S.C. sec. 533, which requires consultation and coordination between federal and local officials involving the acquisition of land and construction of a building in

an urban environment, especially concerning plan for water supply, sewage disposal, solid waste disposal, etc., mentioned in the letters.

Again, we respectfully submit that the Court of Appeals fell into error: the letters nowhere mention 42 U.S.C. sec. 533, but expressly state they were being sent pursuant to the Intergovernmental Cooperation Act and the Presidential directives thereunder.

GSA has made, and continues to this day to make, and will in the future continue to make, in connection with hundreds and possibly thousands of other projects, similar determinations under

the Intergovernmental Cooperation Act (in order to obtain the approval and assistance of state and local elected officials), but has neglected, and continues to this day to neglect, and will in the future neglect, to file, in each case, prior to construction, the necessary environmental impact statement.

It can thus be seen that the Congressional purpose in enacting NEPA has been largely frustrated, continues to be frustrated and in the future will be frustrated, in connection with hundreds and possibly thousands of federal projects, by not only GSA, but by other federal agencies as well. In order

effectively to put an end to this unrelenting frustration of the national purpose, and to give meaning to the enforcement of NEPA, this Court, it is respectfully submitted, should grant certiorari, so that it may be authoritatively declared that the kind of determination made by GSA in its letters to Governor Rockefeller and Mayor Lindsay, under one environmental statute (ICA), is in effect a determination under NEPA, as well, so that an environmental impact statement must be filed, prior to construction.

Reasons for Granting the Writ
(continued)

c. GSA deprived plaintiffs of due process of law (Fifth Amendment) when it emasculated the public hearing which the Court of Appeals directed it to hold (HANLY, II, 471 F.2d 823, 835-836), by adding to the record of the hearing, without notice to the plaintiffs or an opportunity to be heard, evidentiary matters, upon the basis of which, in material part, GSA reached its determination that the prison will not significantly affect the quality of the

human environment.

(See ex parte additions to record, 192a - 219a, to be read with 183a-191a, consisting of GSA's final determination, covering memorandum in reference thereto, and preamble to GSA's supplementary findings in support of its determination; see, also, pages 36-39, herein, supra).

These ex-parte evidentiary additions to the record of the hearing related to vital environmental questions which were litigated by plaintiffs at the public hearing. (pages 37-39 herein, supra, to be read with 192a - 219a).

Plaintiffs learned, for the first time, of these ex parte additions, and the role they played in GSA's decision-making process, when GSA, on April 3, 1973 (more than two months after the hearing was completed on January 30, 1973) furnished plaintiff's counsel with a copy of its determination and supplemental findings, which contained said ex parte evidentiary additions. (183a - 191a)

What GSA did deprived plaintiffs of due process of law (Fifth Amendment), and rendered the public hearing nugatory.

The facts contained in the ex parte material are "adjudicative facts" -- that is, facts concerning the Courthouse Annex and its alleged multi-faceted environmental impact, as distinguished from "general facts which help the tribunal decide questions of law, policy and discretion". Langevin v. Chenango Court, Inc., 447 F. 2d. 296, 300 (2 Cir.; Chief Judge Friendly; July, 1971), citing Davis, Administrative Law Treatise, section 702, at 413. (1958). "Normally", as Chief Judge Friendly said:

"when a civilian executive or administrative agency is about to take action adverse to a citizen, on the basis of "adjudicative facts," due process entitles the citizen at some stage to have notice, to be informed of the facts on which the agency relies, and to have an opportunity to rebut them, Londoner v. Denver, 210 U.S. 373, 28 S. Ct. 708, 52 L. Ed. 1103 (1908); Goldberg v. Kelly, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970); Escalera v. New York City Housing Authority, 425 F. 2d 853, 862(2 Cir.) Cert. denied, 400 U.S. 853, 91 S. Ct. 54, 27 L. Ed. 2d 91 (1970),

unless the circumstances indicate he has agreed otherwise or he is unable to make a required preliminary showing of grounds that would warrant a hearing, see Pfizer, Inc. v. Richardson, 434 F. 2d 536, 542-543 (2 Cir. 1970)."

"Any escape from this constitutional mandate", "based on the point" that GSA's environmental determination "looked only to the future and thus was 'quasi-legislative', see Baer Bros. Mercantile Co. v. Denver and Rio Grande R.R., 233 U.S. 479, 486, 34 S. Ct. 641, 58 L. ed. 1055 (1914), has long since gone to a deserved repose". Langevin v. Chenango Court, Inc., supra, at pp. 300-301 of 447 F.2d.

With respect to Goldberg v. Kelly, 397 U.S. 254 90 S. Ct. 1011, 25 L. ed. 2d 287, cited in Langevin, supra, see 397 U.S., at pages 267-270.

See, also, Virgin Islands Hotel Association, Inc. v. Virgin Islands Water and Power Authority, 465 F. 2d 1272 (3 Cir.; June 1972), stating that

> " We find it unnecessary to characterize the hearing as quasi-judicial or quasi-legislative As Judge Friendly stated in Langevin v. Chenango Court, Inc. 447 F. 2d at 301, Such a distinction has long since gone to a deserved repose." (page 1276)

And at page 1276 of Virgin Islands Hotel Association, supra, we find the Court saying

"Moreover, the failure of the Authority (which conducted the hearing) to make generally available the primary source for its determination that increases were necessary only underscores the shortcomings of these hearings."

From all the foregoing, it is clear that GSA's environmental determination of April 3, 1973 is without force or effect, since it is not in accordance with due process of law (Fifth Amendment), and is "not in accordance with law" and

"without observance of procedure required by law" (Administrative Procedure Act, Sec. 10 (e), 5 U.S.C., Sec. 706 (2) (a) and (d); Hanly II, 471 F. 2d. at pages 828-829), since (1) it is based, in material part, on evidence which is not part of the record of the public hearing ordered by this Court, and thereafter held by GSA, but was added to said record by GSA ex parte, and after the conclusion of the hearing; and (2) plaintiffs were thus deprived of (a) their right to be confronted, at the hearing, with said evidence; (b) of their right

to an opportunity, at the hearing, to confront and cross-examine the witnesses supplying said evidence, and (c) of their right, at the hearing, to controvert said evidence. Accordingly, it is respectfully submitted that the District Court erred in sustaining GSA's determination, and the Court of Appeals erred in affirming the District Court.

The importance of the question here presented can readily be seen when it is remembered that GSA has held, continues to hold, and will in the future hold other public hearings in connection with other projects.

(HANLY II, 471 F. 2d 823, 837-838), just as other Federal agencies have done, are doing, and will continue to do.

The number of projects thus affected clearly runs into the thousands.

If NEPA is to have any real meaning for the public, this Court, it is respectfully submitted, should grant certiorari to settle the issue posed herein, and thus to impart needed guidance to all Federal agencies contemplating the construction of projects, and holding public hearings in connection with the question

of their environmental impact, as well as any and all other questions.

CONCLUSION

For all the foregoing reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Court of Appeals for the Second Circuit.

Respectfully submitted,

ALFRED S. JULIEN

Attorney for Petitioners

December 10, 1973.

A P P E N D I X

JUDGMENT SOUGHT TO BE REVIEWED, ENTERED SEPTEMBER 10, 1973.

UNITED STATES COURT OF APPEALS

For The

Second Circuit

. . .

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the tenth day of September, one thousand nine hundred and seventy-three.

PRESENT: HON. WILLIAM H. MULLIGAN

HON. JAMES L. OAKES

HON. WILLIAM H. TIMBERS

Circuit Judges,

JUDGMENT SOUGHT TO BE REVIEWED,
ENTERED SEPTEMBER 10, 1973.

DENIS HANLY, SIEN WEI LIU, IRVING ZUCKERMAN, FRANK MOSCO, COVELLE N. BURBANK, DENNIS SULLIVAN AND MARIE BEAULIEU ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Plaintiffs-Appellants,

v.

RICHARD G. KLEINDIENST, AS ATTORNEY GENERAL OF THE UNITED STATES, ROBERT L. KUNZIG, AS ADMINISTRATOR OF GENERAL SERVICES OF THE UNITED STATES, NORMAN A. CARLSON, AS DIRECTOR OF FEDERAL BUREAU OF PRISONS AND UNITED STATES OF AMERICA,

Defendants-Appellees.

73-1948

JUDGMENT SOUGHT TO BE REVIEWED,
ENTERED SEPTEMBER 10, 1973.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said District Court be and it hereby is affirmed with costs to be taxed against the

JUDGMENT SOUGHT TO BE REVIEWED,
ENTERED SEPTEMBER 10, 1973.

appellants.

A. DANIEL FUSARO
Clerk

By: Vincent A. Carlin
Chief Deputy Clerk

OPINION OF THE COURT OF APPEALS,
RENDERED SEPTEMBER 10, 1973
(REPORTED, 484 F 2d. 448)

UNITED STATES COURT OF APPEALS

For the Second Circuit

. . .

No. 1128-September Term, 1972.

(Argued August 17, 1973

Decided September 10, 1973)

Docket No. 73-1948

. . .

DENIS HANLY, SIEN WEI LIU, IRVING ZUCKERMAN, FRANK MOSCO, COVELLE N. BURBANK, DENNIS SULLIVAN, and MARIE BEAULIEU, on behalf of themselves and all others similarly situated,

Plaintiffs-Appellants,

v.

RICHARD G. KLEINDIENST, as Attorney General of the United States, ROBERT L. KUNZIG, as Administrator of General Services of the United States, NORMAN A. CARLSON, as Director of Federal Bureau of Prisons, and United States of America,

Defendants-Appellees.

Before:

MULLIGAN, OAKES AND TIMBERS,

Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York, Charles H. Tenney, Judge, denying a motion for a preliminary injunction to halt

construction of a federal project on the ground that no environmental impact statement had been filed pursuant to 42 U.S.C. Sec. 4332(2)(C).

Affirmed.

Alfred S. Julien, New York, N.Y. (Jesse Alan Epstein, of counsel), for Plaintiffs-Appellants.

Joseph P. Marro, Assistant United States Attorney (Paul J. Curran, United States Attorney for the Southern District of New York), for Defendants-Appellees.

Per Curiam:

This is an appeal from a denial of

a preliminary injunction which sought to halt the construction of the Metropolitan Correction Center, one of two buildings comprising the Foley Square Courthouse Annex. Except for one point, discussed below, we would affirm the judgment of the lower court solely on the basis of Judge Tenney's well reasoned opinion. Judge Tenney held, quite properly we think, that the General Services Administration (GSA) did not act arbitrarily or capriciously in determining, by a supplemental report filed April 6, 1973, reaffirming previous findings, that the Annex would not

significantly affect the quality of the human environment under the National Environmental Policy Act (NEPA), 42 U.S.C. Sec. 4321, and more specifically Sec. 4332 (a) (C), as well as under the decisions of this court in Hanly v. Mitchell, 460 F.2d 640 (2d Cir.), cert. denied, 409 U.S. 990 (1972), and Hanly v. Kleindienst, 471 F. 2d 823 (2d Cir. 1972), cert. denied, 41 U.S.L.W. 3616 (U.S. May 21, 1973).

One point, however, was raised on appeal which was not before the lower court. This involves two identical letters[1] sent by GSA, one to Mayor Lindsay and the other to Governor

Rockefeller. Appellants claim that the letters constitute an admission by GSA of the significant effect the Annex would have on the environment, thus requiring an impact statement under NEPA. We do not find the letters to be such.

---

[1] The letters begin with an identification of the parcel of land involved, continue with descriptions and data relative to the buildings in the Annex, including plans for utility services, and finish with the following sentences:

The Intergovernmental Cooperation Act of 1968, and administrative directives of the President, direct that there be consultation with the appropriate

officials in the planning of any federal project which may have a substantial impact on the community.

Therefore, we would appreciate your cooperation and comments in this endeavor.

The terms of the last sentences of the letters do not constitute any admission that GSA had found there would be significant impact on the community; rather they refer to "any project which may have a substantial impact on the community." (Emphasis supplied) Nor do we believe that these sentences, which appear to be matters of form unrelated to the specifics of the case, were intended to evidence that the GSA Regional Administrator, under whose

name they went out, had reached any conclusion on the question whether the Annex would significantly affect the environment.

Consultation and coordination between federal and local officials involving the acquisition of land and construction of a building in an urban environment, especially concerning plans for water supply, sewage disposal, solid waste disposal, etc., should be done as a matter pf common sense; it is also required by law. See 40 U.S.C. Sec. 533. And there is no limitation that this be done only when such

projects significantly affect the community or its environment.

Deciding as we do that these letters are not admissions by GSA of any significant impact on the community, we need not reach the question whether an action "having a significant impact on ... community development" under Sec. 401 (a) of the Intergovernmental Cooperation Act of 1968, 42 U.S.C. Sec. 4231(a), constitutes an action "significantly affecting the quality of the human environment" under NEPA, thereby requiring an impact statement.

Judgment affirmed.

STATUTES INVOLVED

5 U.S.C.A. Section 706 (p.225)

Sec. 706 Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning of applicability of the terms of an agency action. The reviewing court shall-

(1) complet agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency

STATUTES INVOLVED

5 U.S.C.A.Section 706 (cont.)

action, findings, and conclusions found to be-

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

STATUTES INVOLVED

5 U.S.C.A. Section 706 (cont.)

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the

STATUTES INVOLVED

5 U.S.C.A. Section 706 (cont.)

rule of prejedicial error. Pub.L.89-554, Sept.6, 1966, 80 Stat. 393.

STATUTES INVOLVED

42 U.S.C.A. Chap. 52 (pp.809-817)

INTERGOVERNMENTAL COOPERATION

42 U.S.C.A. Sec. 4201 Public Health and Welfare (p. 810)

Sec. 4201. Definitions

When used in this chapter-

(1) The term "Federal agency" means any department, agency, or instrumentality in the executive branch of the Government and any wholly owned Government corporation.

.....

.....

STATUTES INVOLVED

42 U.S.C.A. Sec. 4201 (cont.)

(9) "Comprehensive planning" includes the following, to the extent directly related to area needs or needs of a unit of general local government: (A) preparation, as a guide for governmental policies and action, of general plans with respect to (i) the pattern and intensity of land use, (ii) the provision of public facilities (including transportation facilities) and other government services, and (iii) the effective development and utilization of

STATUTES INVOLVED

42 U.S.C.A. Sec. 4201 (cont.)

human and natural resources; (B) long-range physical and fiscal plans for such action; (C) programing of capital improvements and other major expenditures, based on a determination of relative urgency, together with definitive financing plans for such expenditures in the earlier years of the program; (D) coordination of all related plans and activities of the State and local governments and agencies concerned; and

STATUTES INVOLVED

42 U.S.C.A. Sec. 4201 (cont.)

(E) preparation of regulatory and administrative measures in support of the foregoing.

(10) The term "head of a Federal agency" or "head of a State agency" includes a duly designated delegate of such agency head. Pub.L.90-577, Title I, Secs. 101-110, Oct. 16,1968, 82 Stat. 1098-1101 (p.810)

STATUTES INVOLVED

42 Sec. 4231 PUBLIC HEALTH AND WELFARE

SUBCHAPTER IV.-DEVELOPMENT ASSISTANCE PROGRAMS; COORDINATED INTERGOVERNMENTAL POLICY AND ADMINISTRATION. (pp. 816-817)

Sec. 4231. Declaration of Development Assistance Policy.

(a) The economic and social development of the Nation and the achievement of satisfactory levels of living depend upon the sound and orderly development of all areas, both urban and rural. Moreover, in a time of rapid urbanization, the sound and orderly development of urban communities depends to a large

42 U.S.C.A. SEC. 4231

degree upon the social andi economic health and the sound devellopment of smaller communities and ruural areas. The President shall, thereefore, establish rules and regulationss governing the formulation, evaluaticon, and review of Federal programss and projects having a significant impacct on area and community development,, including programs providing Federall assistance to the States and localitiies, to the end that they shall most effectively serve these basic objectiives. Such rules and regulations shall provide for full consideration of the concurrent

achievement of the following specific objectives and, to the extent authorized by law, reasoned choices shall be made between such objectives when they conflict:

(1) Appropriate land uses for housing, commercial, industrial, governmental, institutional, and other purposes;

(2) Wise development and conservation of natural resources, including land, water, minerals, wildlife, and others;

(3) Balanced transportation systems including highway, air, water, pedestrian, mass transit, and other modes for the movement of people and goods;

42 U.S.C.A. 4231

(4) Adequate outdoor recreation and open space;

(5) Protection of areas of unique natural beauty, historical and scientific interest;

(6) Properly planned community facilities, including utilities for the supply of power, water, and communications, for the safe disposal of wastes, and for ther purposes; and

(7) Concern for high standards of design.

(b) All viewpoints-national, regional, State, and local-shall, to the extent possible, be fully considered and taken

into account in planning Federal or federally assisted development programs and projects. State and local government objectives, together with the objectives of regional organizations shall be considered and evaluated within a framework of national public objectives as expressed in Federal law, and available projections of future national conditions and needs of regions, States, and localities shall be considered in plan formulation, evaluation, and review.

(c) To the maximum extent possible, consistent with national objectives, all Federal aid for development purposes shall be consistent with and further the

objectives of State, regional, and local comprehensive planning. Consideration shall be given to all developmental aspects of our total national community, including but not limited to housing, transportation, economic development, natural and human resources development, community facilities , and the general improvement of living environments.

(d) Each Federal department and agency administering a development assistance program shall, to the maximum extent practicable, consult with and seek advice from all other significantly affected Federal

42 U.S.C.A. 4231

departments and agencies in an effort to assure fully coordinated programs.

(e) Insofar as possible, systematic planning required by individual Federal programs (such as highway construction, urban renewal, and open space) shall be coordinated with and, to the extent authorized by law, made part of comprehensive local and areawide development planning.

Pub.L. 90-577, Title IV, Sec. 401, Oct. 16, 1968, 82 Stat. 1103.

* * *

Sec. 4233 Rules and Regulations

The Bureau of the Budget or such

42 U.S.C.A. Sec. 4233

other agency as may be designated by the President is hereby authorized to prescribe such rules and regulations as are deemed appropriate for the effective administration of this subchapter.

Pub.L. 90-577, Title IV, Sec. 403, Oct. 16, 1968, 82 Stat.1104.

STATUTES INVOLVED

42 U.S.C.A., Chapter 55
NATIONAL ENVIRONMENTAL POLICY
(pp. 209 et seq.)

. . .

Sec. 4321. Congressional declaration of purpose.

The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental

42 U.S.C.A., Chapter 55
National Environmental Policy

Quality. Pub. L. 91-190, Sec. 2,

Jan. 1, 1970, 83 Stat. 852.

Sec. 4331. Congressional Declaration of national environmental policy. (pp. 221 et. seq.)

(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation and new and expanding technological advances and recognizing further the critical importance of restoring and

42 U.S.C.A. Sec. 4331.

maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in cooperation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and anture can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

42 U.S.C.A. Sec. 4331.

(b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may--

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

42 U.S.C.A. Sec. 4331

(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity and variety of individual choice;

(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

(6) enhance the quality of

renewable resources and approach the maximum attainable recycling of depletable resources.

(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.

Pub.L. 91-190, Title I, Sec. 101, Jan. 1, 1970, 83 Stat. 852.

Sec. 4332.

Cooperation of agencies; reports; availability of information; recommendations; international and national coordination of efforts. (pp. 225 et seq.)

The Congress authorizes and directs

42 U.S.C.A. Sec. 4332.

that, to the fullest extent possible;

(1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall -

(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision making which may have an impact on man's environment;

42 U.S.C.A. Sec. 4332

(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by sub-chapter II of this chapter, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision-making along with economic and technical considerations;

(C)include in every recommendation or report on proposals for legislatior and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on -

42 U.S.C.A. Sec. 4332

(i) the environmental impact of the proposed action,

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

(iii) alternatives to the proposed action,

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, state, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Enfironmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review process;

42 U.S.C.A. Sec. 4332.

(D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

(E)recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

42 U.S.C.A. Sec. 4332

(F) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining and enhancing the quality of the environment;

(G) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

(H) assist the Council on Environmental Quality established by subchapter II of this chapter.

Pub. L. 91-190, Title I, Sec. 102, Jan. 1, 1970, 83 Stat. 853.

Section 4333.

Conformity of administrative procedures to national environmental policy. (p. 241)

42 U.S.C.A. Section 4333.

All agencies of the Federal Government shall review their present statutory authority, administrative regulations, and current policies and procedures for the purpose of determining whether there are any deficiencies or inconsistencies therein which prohibit full compliance with the purposes and provisions of this chapter and shall propose to the President not later than July 1, 1971, such measures as may be necessary to bring their authority and policies into conformity with the intent, purposes and procedures set forth in this chapter.

Pub. L. 91-190, Title I, Sec. 103, Jan. 1, 1970, 83 Stat. 854.

42 U.S.C.A. Sec. 4334

Other statutory obligations of agencies (p. 242)

Nothing in section 4332 or 4333 of this title shall in any way affect the specific statutory obligations of any Federal agency (1) to comply with criteria or standards of environmental quality, (2) to coordinate or consult with any other Federal or State agency, or (3) to act, or refrain from acting contingent upon the recommendations or certification of any other Federal or State agency.

Pub. L. 91-190, Title I, Sec. 104, Jan. 1, 1970, 83 Stat. 854.

42 U.S.C.A. Sec. 4335

Efforts supplemental to existing authorizations. (p. 243)

The policies and goals set forth in this chapter are supplementary to those set forth in existing authorizations of Federal agencies.

Pub. L. 91-190, Title I, Sec. 105, Jan. 1, 1970, 83 Stat. 854.

SUBCHAPTER II.-Council on Environmental Quality

Section 4341. Reports to Congress; recommendations for legislation (pp. 243, et seq.)

The President shall transmit to the Congress annually beginning July 1, 1970, an Environmental Quality Report (hereinafter referred to as the "report") which shall set forth

42 U.S.C.A. 4341.

(1) the status and condition of the major natural, manmade, or altered environmental classes of the nation, including, but not limited to, the air, the aquatic, including marine, estuarine, and fresh water, and the terrestrial environment, including, but not limited to, the forest, dryland, wetland, range, urban, suburban, and rural environment;

(2) current and foreseeable trends in the quality, management and utilization of such environments and the effects of those trends on the social, economic, and other requirements of the Nation;

(3) the adequacy of available natural resources for fulfilling human and

42 U.S.C.A. Sec. 4341.

economic requirements of the Nation in the light of expected population pressures; (4) a review of the programs and activities (including regulatory activities) of the Federal Government, the State and local governments, and nongovernmental entities or individuals, with particular reference to their effect on the environment and on the conservation, development and utilization of natural resources; and (5) a program for remedying thedeficiencies of existing programs and activities, together with recommendations for legislation.

Publ. 91- 190, Title II, Sec. 201, Jan. 1, 1970, 83 Stat. 854.

42 U.S.C.A. Sec. 4342.

Establishment; membership; Chairman; appointments (p. 244)

There is created in the Executive Office of the President a Council on Environmental Quality (hereinafter referred to as the "Council"). The Council shall be composed of three members who shall be appointed by the President to serve at his pleasure, by and with the advice and consent of the Senate. The President shall designate one of the members of the Council to serve as Chairman. Each member shall be a person who, as a result of his training, experience, and attainments, is exceptionally well qualified to analyze and interpret environmental trends and information of

42 U.S.C.A. Sec. 4342.

all kinds; to appraise programs and activities of the Federal Government in the light of the policy set forth in subchapter I of this chapter; to be conscious of and responsive to the scientific, economic, social, esthetic, and cultural needs and interests of the Nation; and to formulate and recommend national policies to promote the improvement of the quality of the environment.

Pub. L. 91-190, Title II, Sec. 202, Jan. 1, 1970, 83 Stat. 854.

Sec. 4344. Duties and functions (p. 244 et seq.)

It shall be the duty and function of the Council -

42 U.S.C.A.

(1) to assist and advise the President in the preparation of the Environmental Quality Report required by section 4341 of this title;

(2) to gather timely and authoritative information concerning the conditions and trends in the quality of the environment both current and prospective, to analyze and interpret such information for the purpose of determining whether such conditions and trends are interfering, or are likely to interfere, with the achievement of the policy set forth in subchapter I of this chapter, and to compile and submit to the President studies relating to such conditions

and trends;

(3) to review and appraise the various programs and activities of the Federal Government in thelight of the policy set forth in subchapter I of this chapter for the purpose of determining the extent to which such programs and activities are contributing to the achievement of such policy, and to make recommendations to the President with respect thereto;

(4) to develop and recommend to the President national policies to foster and promote the improvement of environmental quality to meet the conservation, social, economic, health, and other requirements and goals of the Nation;

42 U.S.C.A. Sec. 4344.

(5) to conduct investigations, studies, surveys, research, and analyses relating to ecological systems and environmental quality;

(6) "to document and define changes in the natural environment, including the plant and animal systems, and to accumulate necessary date and other information for a continuing analysis of these changes or trends and an interpretation of their underlying causes;

(7) to report at least once each year to the President on the state and condition of the environment; and

(8) to make and furnish such studies, reports thereon, and recommendations with respect to matters of

42. U.S.C.A. Sec. 4344

policy and legislation as the President may request.

Pub. L. 91-190, Title II, Sec. 204, Jan. 1, 1970, 83 Stat. 855.

42 U.S.C.A. Chap. 56

Section 4371. Congressional findings, declarations, and purposes.

(a) The Congress finds -

(1) that man has caused changes in the environment;

(2) that many of these changes may affect the relationship between man and his environment; and

(3) that population increases and urban concentration contribute directly to pollution and the degradation of our environment.

(b) (1) The Congress declares that there is a national policy for the environment which provides for the

enhancement of environmentalquality. This policy is evidenced by statutes heretofore enacted relating to the prevention, abatement, and control of environmental pollution, water and land resources, transportation, and economic and regional development.

(2) The primary responsibility for implementing this policy rests with State and local governments.

(3) The Federal Government encourages and supports implementation of this policy through appropriate regional organizations established under existing law.

(c) The purposes of this chapter are-

42 U.S.C.A. Sec. 4371.

(1) to assure that each Federal department and agency conducting or supporting public works activities which affect the environment shall implement the policies established under existing law; and

(2) to authorize an Office of Environmental Quality, which, notwithstanding any other provision of law, shall provide the professional and administrative staff for the Council on Environmental Quality established by Public Law 91-190.

Pub. L. 91-224, Title II, Sec. 202, Apr. 3, 1970, 84 Stat. 114.

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Guidlines, Council on
Environmental Quality,
April, 1971
(36 Fed. Reg. 7724-29) *

Statements on Proposed Federal
Actions Affecting the Environment

1. Purpose. This memorandum provides guidelines to Federal departments, agencies, and establishments for preparing detailed environmental statements on the proposals for legislation and other major Federal actions significantly affecting the quality of the human environment as required by section 102 (2) (C) of the National Environmental Policy Act (Public Law 91-190) (hereafter "the Act").

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* The Council on Environmental Quality proposed amendments to its guidelines. (38 Fed. Reg. 10856 (May 2, 1973)

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Underlying the preparation of such environmental statements is the mandate of both the Act and Executive Order 11514 (35 F.R. 4247) of March 4, 1970, that all Federal agencies, to the fullest extent possible, direct their policies, plans and programs so as to meet national environmental goals. The objective of section 102 (2) (C) of the Act and of these guidelines is to build into the agency decision-making process an appropriate and careful consideration of the environmental aspects of proposed action and to assist agencies in

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implementing not only the letter, but the spirit, of the Act. This memorandum also provides guidance on implementation of section 309 of the Clean Air Act, as amended (42 U.S.C. 1857 et seq.)

2. Policy. As early as possible and in all cases prior to agency decision concerning major action or recommendation or a favorable report on legislation that significantly affects the environment, Federal agencies will, in consultation with other appropriate Federal, State, and local agencies, assess in detail the potential environmental impact in

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order that adverse effects are avoided, and environmental quality is restored or enhanced, to the fullest extent practicable. In particular, alternative actions that will minimize adverse impact should be explored and both the long- and short-range implications to man, his physical and social surroundings, and to nature, should be evaluated in order to avoid to the fullest extent practicable undesirable consequences for the environment.

3. Agency and OMB procedures. (a) Pursuant to section 2 (f) of

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Executive Order 11514, the heads of Federal agencies have been directed to proceed with measures required by section 102 (2) (C) of the Act. Consequently, each agency will establish, in consultation with the Council on Environmental Quality, not later than June 1, 1970 (and, by July 1, 1971, with respect to requirements imposed by revisions in these guidelines, which will apply to draft environmental statements circulated after June 30, 1971), its own formal procedures for: (1) Identifying those agency actions requiring environmental statements, the appropriate time prior to decision

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for the consultations required by section 102 (2) (C), and the agency review process for which environmental statements are to be available, (2) obtaining information required in their preparation, (3) designating the officials who are to be responsible for the statements, (4) consulting with and taking account of the comments of appropriate Federal, State, and local agencies, including obtaining the comment of the Administrator of the Environmental Protection Agency, whether or not an environmental statement is prepared, when required under

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for the consultations required by section 102 (2) (C), and the agency review process for which environmental statements are to be available, (2) obtaining information required in their preparation, (3) designating the officials who are to be responsible for the statements, (4) consulting with and taking account of the comments of appropriate Federal, State, and local agencies, including obtaining the comment of the Administrator of the Environmental Protection Agency, whether or not an environmental statement is prepared, when required under

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section 309 of the Clean Air Act, as amended, and section 8 of these guidelines, and (5) meeting the requirements of section 2 (b) of Executive Order 11514 for providing timely public information on Federal plans and programs with environmental impact including procedures responsive to section 10 of these guidelines. These procedures should be consonant with the guidelines contained herein. Each agency should file seven (7) copies of all such procedures with the Council on Environmental Quality, which will provide advice to agencies in the preparation of their procedures

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and guidance on the application and interpretation of the Council's guidelines. The Environmental Protection Agency will assist in resolving any question relating to section 309 of the Clean Air Act, as amended.

(b) Each Federal agency should consult, with the assistance of the Council on Environmental Quality and the Office of Management and Budget if desired, with other appropriate Federal agencies in the development of the above procedures so as to achieve consistency in dealing with

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similar activities and to assure effective coordination among agencies in their review of proposed activities.

(c) State and local review of agency procedures, regulations, and policies for the administration of Federal programs of assistance to State and local governments will be conducted pursuant to procedures established by the Office of Management and Budget Circular No. A-85. For agency procedures subject to OMB Circular No. A-85 a 30-day extension in the July 1, 1971, deadline set in section 3 (a) is granted.

(d) It is imperative that existing

mechanisms for obtaining the views of Federal, State, and local agencies on proposed Federal actions be utilized to the extent practicable in dealing with environmental matters. The Office of Management and Budget will issue instructions, as necessary, to take full advantage of existing mechanisms (relating to procedures for handling legislation, preparation of budgetary materials, new procedures, water resource and other projects, etc.)

4. Federal agencies included. Section 102 (2) (C) applies to all agencies of the Federal Government with

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respect to recommendations or favorable reports on proposals for (i) legislation and (ii) other major Federal actions significantly affecting the quality of the human environment. The phrase "to the fullest extent possible" in section 102 (2) (C) is meant to make clear that each agency of the Federal Government shall comply with the requirement unless existing law applicable to the agency's operations expressly prohibits or makes compliance impossible. (Section 105 of the Act provides that "The policies and goals set forth in

this Act are supplementary to those set forth in existing authorizations of Federal agencies.")

5. Actions included. The following criteria will be employed by agencies in deciding whether a proposed action requires the preparation of an environmental statement:

(a) "Actions" include but are not limited to:

(i) Recommendations or favorable reports relating to legislation including that for appropriations. The requirement for following the section 102 (2) (C) procedure as elaborated in

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these guidelines applies to both (i) agency recommendations on their own proposals for legislation and (ii) agency reports on legislation initiated elsewhere. (In the latter case only the agency which has primary responsibility for the subject matter involved will prepare an environmental statement.)

The Office of Management and Budget will supplement these general guidelines with specific instructions relating to the way in which the section 102 (2) (C) procedure fits into its legislative clearance process;

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(ii) Projects and continuing activities: directly undertaken by Federal agencies; supported in whole or in part through Federal contracts, grants, subsidiaries, loans, or other forms of funding assistance; involving a Federal lease, permit, license, certificate, or other entitlement for use;

(iii) Policy, regulations, and procedure-making.

(b) The statutory clause "major Federal actions significantly affecting the quality of the human environment" is to be construed by agencies with a view to the overall, cumulative impact of the action proposed (and of further

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actions contemplated). Such actions may be localized in their impact, but if there is potential that the environment may be significantly affected, the statement is to be prepared. Proposed actions, the environmental impact of which is likely to be highly controversial, should be covered in all cases. In considering what constitutes major action significantly affecting the environment, agencies should bear in mind that the effect of many Federal decisions about a project or complex of projects can be individually limited but cumulatively considerable.

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This can occur when one or more agencies over a period of years puts into a project individually minor but collectively major resources, when one decision involving a limited amount of money is a precedent for action in much larger cases or represents a decision in principle about a future major course of action, or when several government agencies individually make decisions about partial aspects of a major action. The lead agency should prepare an environmental statement if it is reasonable to anticipate a cumulatively significant impact on the

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environment from Federal action. "Lead agency" refers to the Federal agency which has primary authority for committing the Federal Government to a course of action with significant environmental impact. As necessary, the Council on Environmental Quality will assist in resolving questions of lead agency determination.

(C) Section 101 (b) of the Act indicates the broad range of aspects of the environment to be surveyed in any assessment of significant effect. The Act also indicates that adverse significant effects include those that

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degrade the quality of the environment, curtail the range of beneficial uses of the environment, and serve short-term to the disadvantage of long-term, environmental goals. Significant effects can also include actions which may have both beneficial and detrimental effects, even if, on balance, the agency believes that the effect will be beneficial. Significant adverse effects on the quality of the human environment include both those that directly affect human beings and those that indirectly affect human beings through adverse effects on the environment.

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(d) Because of the Act's legislative history, environmental protective regulatory activities concurred in or taken by the Environmental Protection Agency are not deemed actions which require the preparation of environmental statements under section 102(2) (C) of the Act.

6. Content of environmental statement. (a) The following points are to be covered:

(i) A description of the proposed action including information and technical data adequate to permit a careful assessment of environmental impact by commenting agencies.

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Where relevant, maps should be provided.

(ii) The probable impact of the proposed action on the environment, including impact on ecological systems such as wildlife, fish, and marine life. Both primary and secondary significant consequences for the environment should be included in the analysis. For example, the implications, if any, of the action for population distribution or concentration should be estimated and an assessment made of the effect of any possible change in population patterns upon the resource base, including land use, water, and public services, of the area in question.

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(iii) Any probable adverse environmental effects which cannot be avoided (such as water or air pollution, undesirable land use patterns, damage to life systems, urban congestion, threats to health or other consequences adverse to the environmental goals set out in section 101 (b) of the Act.)

(iv) Alternatives to the proposed action (section 102 (2) (D) of the Act requires the responsible agency to "study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources").

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A rigorous exploration and objective evaluation of alternative actions that might avoid some or all of the adverse environmental effects is essential. Sufficient analysis of such alternatives and their costs and impact on the environment should accompany the proposed action through the agency review process in order not to foreclose prematurely options which might have less detrimental effects.

(v) The relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity. This in

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essence requires the agency to assess the action for cumulative and long-term effects from the perspective that each generation is trustee of the environment for succeeding generations.

(vi) Any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented. This requires the agency to identify the extent to which the action curtails the range of beneficial uses of the environment.

(vii) Where appropriate, a discussion of problems and objections

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raised by other Federal, State, and local agencies and by private organizations and individuals in the review process and the disposition of the issues involved. (The section may be added at the end of the review process in the final text of the environmental statement.)

(b) With respect to water quality aspects of the proposed action which have been previously certified by the appropriate State or interstate organization as being in substantial compliance with applicable water quality standards, the comment of the

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Environmental Protection Agency should also be requested.

(c) Each environmental statement should be prepared in accordance with the precept in section 102(2) (A) of the Act that all agencies of the Federal Government utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and decision-making which may have an impact on man's environment.

(d) Where an agency follows a practice of declining to favor an alternative until public hearings

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have been held on a proposed action, a draft environmental statement may be prepared and circulated indicating that two or more alternatives are under consideration.

(e) Appendix 1 prescribes the form of the summary hseet which should accompany each draft and final environmental statement (omitted).

7. Federal agencies to be consulted in connection with preparation of environmental statement. A Federal agency considering an action requiring an environmental statement, on the basis of: (i) A draft environmental

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statement for which it takes responsibility, or (ii) comparable information followed by a hearing subject to the provisions of the Administrative Procedure Act, should consult with, and obtain the comment on the environmental impact of the action of, Federal agencies with jurisdiction by law or special expertise with respect to any environmental impact involved. These Federal agencies include components of (depending on the aspect or aspects of the environment):

Advisory Council on Historic Preservation

Department of Agriculture

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Department of Commerce

Department of Defense

Department of Health, Education, and Welfare

Department of Housing and Urban Development

Department of the Interior

Department of State

Department of Transportation

Atomic Energy Commission

Federal Power Commission

Environmental Protection Agency

Office of Economic Opportunity

For actions specifically affecting the environment of their geographic jurisdictions, the following Federal and Federal-State agencies are also

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to be consulted:

Tennessee Valley Authority

Appalachian Regional Commission

National Capital Planning Commission

Delaware River Basin Commission

Susquehanna River Basin Commission

Agencies seeking comment should determine which one or more of the above listed agencies are appropriate to consult on the basis of the areas of expertise identified in appendix 2 to these guidelines (omitted). It is recommended: (i) That the above listed departments and agencies establish contact points, which often are most

appropriately regional offices, for providing comments on the environmental statements, and (ii) that departments from which comment is solicited coordinate and consolidate the comments of their component entities. The requirement in section 102 (2) (C) to obtain comment from Federal agencies having jurisdiction or special expertise is in addition to any specific statutory obligation of any Federal agency to coordinate or consult with any other Federal or State agency. Agencies seeking comment may establish time limits of not less than thirty (30) days for

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reply, after which it may be presumed, unless the agency consulted requests a specified extension of time, that the agency consulted has no comment to make. Agencies seeking comment should endeavor to comply with requests for extensions of time of up to fifteen (15) days.

8. Interim EPA procedures for implementation of section 309 of the Clean Air Act, as amended. (a) Section 309 of the Clean Air Act, as amended, provides:

Sec. 309. (a) The Administrator shall review and comment in writing on the environmental impact of any

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matter relating to duties and responsibilities granted pursuant to this Act or other provisions of the authority of the Administrator, contained in any (1) legislation proposed by any Federal department or agency, (2) newly authorized Federal projects for construction and any major Federal agency action (other than a project for construction) to which section 102 (2)(C) of Public Law 91-190 applies, and (3) proposed regulations published by any department or agency of the Federal Government. Such written comment shall be made

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public at the conclusion of any such review.

(b) In the event the Administrator determines that any such legislation, action, or regulation is unsatisfactory from the standpoint of public health or welfare or environmental quality, he shall publish his determination and the matter shall be referred to the Council on Environmental Quality.

(b) Accordingly, wherever an agency action related to air or water quality, noise abatement and control, pesticide regulation, solid waste disposal, radiation criteria and

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standards, or other provisions of the authority of the Administrator if the Environmental Protection Agency is involved, including his enforcement authority, Federal agencies are required to submit for review and comment by the Administrator in writing: (i) Proposals for new Federal construction projects and other major Federal agency actions to which section 102 (2) (C) of the National Environmental Policy Act applies, and (ii) proposed legislation and regulations, whether or not section 102 (2) (C) of the National

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Environmental Policy Act applies. (Actions requiring review by the Administrator do not include litigation or enforcement proceedings.) The Administrator's comments shall constitute his comments for the purposes of both section 309 of the Clean Air Act and section 102 (2) (C) of the National Environmental Policy Act. A period of 45 days shall be allowed for such review. The Administrator's written comment shall be furnished to the responsible Federal department or agency, to the Council on Environmental Quality and

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Guidelines, Council on Environmental Quality.

summarized in a notice published in the Federal Register. The public may obtain copies of such comment on request from the Environmental Protection Agency.

9. State and local review. Where no public hearing has been held on the proposed action at which the appropriate State and local review has been invited, and where review of the environmental impact of the proposed action by State and local agencies authorized to develop and enforce environmental standards is relevant, such State and local review shall be

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provided as follows:

(a) For direct Federal development projects and projects assisted under programs listed in attachment D of the Office of Management and Budget Circular No. A-95, review of draft environmental statements by State and local governments will be through procedures set forth under part 1 of Circular No. A-95.

(b) Where these procedures are not appropriate and where a proposed action affects matters within their jurisdiction, review of the draft environmental statement on a proposed action by

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State and local agencies authorized to develop and enforce environmental standards and their comments on the environmental impact of the proposed action may be obtained directly or by distributing the draft environmental statement to the appropriate State, regional, and metropolitan clearinghouse unless the Governor of the State involved has designated some other point for obtaining this review.

10. Use of statements in agency review processes; distribution to Council on Environmental Quality; availability to public.

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(a) Agencies will need to identify at what stage or stages of a series of actions relating to a particular matter the environmental statement procedures of this directive will be applied. It will often be necessary to use the procedures both in the development of a national program and in the review of proposed projects within the national program. However, where a grant-in-aid program does not entail prior approval by Federal agencies of specific projects, the view of Federal, State, and local agencies

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(a) Agencies will need to identify at what stage or stages of a series of actions relating to a particular matter the environmental statement procedures of this directive will be applied. It will often be necessary to use the procedures both in the development of a national program and in the review of proposed projects within the national program. However, where a grant-in-aid program does not entail prior approval by Federal agencies of specific projects, the view of Federal, State, and local agencies

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in the legislative process may have to suffice. The principle to be applied is to obtain views of other agencies at the earliest feasible time in the development of program and project proposals. Care should be exercised so as not to duplicate the clearance process, but when actions being considered differ significantly from those that have already been reviewed pursuant to section 102 (2) (C) of the Act an environmental statement should be provided.

(b) Ten (10) copies of draft environmental statements (when

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prepared), ten (10) copies of all comments made thereon (to be forwarded to the Council by the entity making comment at the time comment is forwarded to the responsible agency), and ten (10) copies of the final text of environmental statements (together with all comments received thereon by the responsible agency from Federal, State, and local agencies and from private organizations and individuals) shall be supplied to the Council on Environmental Quality in the Executive Office of the President (this will serve as making environmental statements available to the President). It is

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important that draft environmental statements be prepared and circulated for comment and furnished to the Council early enough in the agency review process before an action is taken in order to permit meaningful consideration of the environmental issues involved. To the maximum extent practicable no administrative action (i.e., any proposed action to be taken by the agency other than agency proposals for legislation to Congress or agency reports on legislation) subject to section 102

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(2) (C) is to be taken sooner than ninety (90) days after a draft environmental statement has been circulated for comment, furnished to the Council and, except where advance public disclosure will result in significantly increased costs of procurement to the Government, made available to the public pursuant to these guidelines; neither should such administrative action be taken sooner than thirty (30) days after the final text of an environmental statement (together with comments) has been made

available to the Council and the public. If the final text of an environmental statement is filed within ninety (90) days after a draft statement has been circulated for comment, furnished to the Council and made public pursuant to this section of these guidelines, the thirty (30) day period and ninety (90) day period may run concurrently to the extent that they overlap.

(c) With respect to recommendations or reports on proposals for legislation to which section 102 (2) (C) applies, the final text of the

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environmental statement and comments thereon should be available to the Congress and to the public in support of the proposed legislation or report. In cases where the scheduling of congressional hearings on recommendations or reports on proposals for legislation which the Federal agency has forwarded to the Congress does not allow adequate time for the completion of a final text of an environmental statement(together with comments), a draft environmental statement may be furnished to the Congress and made available to the public pending

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transmittal of the comments as received and the final text.

(d) Where emergency circumstances make it necessary to take an action with significant environmental impact without observing the provisions of these guidelines concerning minimum periods for agency review and advance availability of environmental statements, the Federal agency proposing to take action should consult with the Council on Environmental Quality about alternative arrangements. Similarly, where there are overriding considerations of expense to the Government or

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impaired program effectiveness, the responsible agency should consult the Council concerning appropriate modifications of the minimum periods.

(e) In accord with the policy of the National Environmental Policy Act and Executive Order 11514, agencies have a responsibility to develop procedures to insure the fullest practicable provision of timely public information and understanding of Federal Plans and programs with environmental impact in order to obtain the views of interested parties. These procedures shall include, whenever appropriate,

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provision for public hearings, and shall provide the public with relevant information, including information on alternative courses of action. Agencies which hold hearings on proposed administrative actions or legislation should make the draft environmental statement available to the public at least 15 days prior to the time of the relevant hearings except where the agency prepares the draft statement on the basis of a hearing subject to the Administrative Procedure Act and preceded by adequate

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public notice and information to identify the issues and obtain the comments provided for in sections 6 to 9 of these guidelines.

(f) The agency which prepared the environmental statement is responsible for making the statement and the comments received available to the public pursuant to the provisions of the Freedom of Information Act (5 U.S.C., sec. 552), without regard to the exclusion of interagency memoranda when such memoranda transmit comments of Federal agencies listed in section 7 of these guidelines upon the environ-

mental impact of proposed actions subject to section 102(2) (C).

(g) Agency procedures prepared pursuant to section 3 of these guidelines shall implement these public information requirements and shall include arrangements for availability of environmental statements and comments at the head and appropriate regional offices of the responsible agency and at appropriate State, regional, and metropolitan clearinghouses unless the Governor of the State involved designates some

other point for receipt of this information.

11. Application of section 102 (2) (C) procedure to existing projects and programs.

To the maximum extent practicable the section 102 (2) (C) procedure should be applied to further major Federal actions having a significant effect on the environment even though they arise from projects or programs initiated prior to enactment of the Act on January 1, 1970. Where it is not practicable to reassess the basic

course of action, it is still important that further incremental major actions be shaped so as to minimize adverse environmental consequences. It is also important in further action that account be taken of environmental consequences not fully evaluated at the outset of the project or program.

12. Supplementary guidelines, evaluation of procedures. (a) The Council on Environmental Quality after examining environmental statements and agency procedures with respect to such statements will issue such supplements

to these guidelines as are necessary.

(b) Agencies will continue to assess their experience in the implementation of the section 102(2) (C) provisions of the Act and in conforming with these guidelines and report thereon to the Council on Environmental Quality by December 1, 1971. Such reports should include an identification of the problem areas and suggestions for revision or clarification of these guidelines to achieve effective coordination of views on environmental aspects (and alternatives,

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where appropriate) of proposed actions without imposing unproductive administrative procedures.

RUSSELL E. TRAIN

Chairman

COMPARATIVE TABLE
SHOWING

(a) The interrelationship of the Intergovernmental Cooperation Act (ICA, sections 101, 109, 110, 401, 42 U.S.C.A., sections 4201 (i), (9) and (10)), the Presidential directives implements ICA (Circular No. A-95 of the office of Management and Budget), the Environmental Quality Improvement Act (EQIA; sec. 202, 42 U.S.C.A., sec. 4371); the National Environmental Policy Act (NEPA, secs. 2, 101, 102, etc.; 42 U.S.C.A., sections 4321, 4331, 4332, etc.); and the Guidelines of the Council on Environmental Quality, (CEQ; 36 Fed. Reg. 7724-29); and

COMPARATIVE TABLE SHOWING

(b) The virtual identity of the environmental concerns, standards and goals of the above-named statutes and regulations.*

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* All of the statutes and regulations are set forth in this appendix.

(See Index to Appendix)

COMPARATIVE TABLE OF ENVIRONMENTAL STATUTES AND REGULATIONS.

Intergovernmental Cooperation Act (ICA; 42 U.S.C. secs. 4201-4233), the Environmental Quality Improvement Act (EQIA; 42 U.S.C. secs. 4371-4374) and Circular A-95.

Environmental Considerations, Criteria and Goals

1) "enhancement of environmental quality" (EQIA and ICA, read together, as follows: EQIA, 42 U.S.C. section 4371 (b) (1), stating that statutes heretofore enacted relating to the prevention, abatement and control of environmental pollution, water and land resources, transportation, and economic and regional development, are impressed with the national policy of the enhancement of environmental quality,

Environmental Considerations, Criteria and Goals

and ICA, 42 U.S.C. section 4231, relates to said matters; and Circular A-95, 1 (c), 2 (a), 3 (b), and Part II.

Now see:

National Environmental Policy Act (NEPA; 42 U.S.C. secs.4321-4347), and the Guidelines of the Council on Environmental Quality (CEQ Guidelines; 36 Fed. Reg. - #79; April 23, 1971- 7724-7729)

Environmental Considerations, Criteria and Goals

1) (a) "restoring, maintaining and enhancing the quality of the environment" (42 U.S.C.4332 (2) (F).

(b) "Foster and promote the improvement of environmental quality" (42 U.S.C. sec. 4344 (4)).

(c) Prevent or eliminate damage to the environment" (42 U.S.C.,sec.4321)

ICA, EQIA AND CIRCULAR A-95

2) "The achievement of satisfactory levels of living" (42 U.S.C. 4231 (C)).

Now see:

NEPA and CEQ GUIDELINES

2) "High standards of living and a wide sharing of life's amenities" (42 U.S.C., sec. 4331 (b) (5).

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3) The promotion of "social and economic health" (42 U.S.C., section 4231 (a)).

Now see:

ICA, EQIA AND CIRCULAR A-95

3) a) The promotion of "social, economic health" (42 U.S.C., section 4344 (4); section 4331 (b) (2)(3); section 4341 (1) (2).

ICA, EQIA AND CIRCULAR A-95

b) The promotion of the "health and welfare of man" (42 U.S.C., section 4321); Also, see CEQ Guidelines, Appendix II heading (36 Fed. Reg. 7727, second col.), pp. 7727-7729, passim, with Appendix II heading.

ICA, EQIA AND CIRCULAR A-95

4) "The proper use of natural resources,including land, water, minerals, wild life and others" (42 U.S.C. sec. 4231 (a) (1)).

Now see:

NEPA and CEQ GUIDELINES

4) The proper use of natural resources (42 U.S.C. section 4341 (3) (9); 4331 (b) (5) (6); sec. CEQ Guidelines, Appendix II; 36 Fed. Reg. 7727-7729,

(April 23, 1971), passim,* and references to "Land Use and Management" (p. 7727); "Water Quality"(p. 7728), 6 (a) (11), p.7725; "Water quality standards" (CEQ Guidelines, 6 (b), p. 7725; 8 (b), p. 7726; "Mineral Land Reclamation" (ibid, p. 7728); 6 (a) (ii), p. 7725; "Wildlife", 6 (a) (ii), p. 7725, and p. 7729.

ICA, EQIA AND CIRCULAR A-95

5)"Production of areas of unique natural beauty, historical and scientific interest" (42 U.S.C. sec. 4231 (a) (5).

Now see:

NEPA AND CEQ GUIDELINES

5) "Preserve important historic, cultural and natural aspects of our national heritage" (42 U.S.C. sec. 4331 (b) (4):

"Historic and Archeological Sites" (CEQ Guidelines; Appendix II, p. 7727); *

"Parks, Forests and Outdoor Recreation" (ibid, p. 7728).

* All references to said Appendix should be read with Appendix caption (p. 7727) referring to "Environmental impact".

ICA, EQIA AND CIRCULAR A-95

6) "Adequate outdoor recreation and open space" (42 U.S.C. sec. 4231 (a) (4)).

Now see:

NEPA AND CEQ GUIDELINES

6) (a) "Parks, Forests, and Outdoor Recreation" (CEQ Guidelines, Appendix II, 7728.

(b) "Preserve Natural aspects of our national heritage" (42 U.S.C. sec. 4331 (b) (4)).

ICA, EQIA AND CIRCULAR A-95

7) "Appropriate land uses for housing, commercial, industrial, governmental, institutional, and other purposes" (42 U.S.C. sec. 4231 (a) (1); emphasis supplied).

Now see:

NEPA AND CEQ GUIDELINES

7a) "Land Use and Management" (CEQ Guidelines, Appendix II,*(p.7727)

7b) Consideration of "alternatives to the proposed action" by a federal agency (42 U.S.C. sec. 4332 (c) (iii)), such as - manifestly - the use of a particular piece of land for governmental or other purposes.

NEPA AND CEQ GUIDELINES

7c) Consideration of impact on environment of industrial expansion (42 U.S.C. sec. 4331 (a)) and alternatives to use of land for said purpose (42 U.S.C. sec. 4332 (c) (iii)); "Undesirable land use patterns" (CEQ. 6 (a) (iii), p. 7725).

ICA, EQIA AND CIRCULAR A-95

8) Consideration of the environmental effects of "rapid urbanization" (42 U.S.C. sec. 4231 (a)).

Now see:

NEPA AND CEQ GUIDELINES

8a) Consideration of the environmental effects of "high-density urbanization" (42 U.S.C. sec. 4331 (a)); and, see, also, "urban concentration" (Environmental Quality Improvement Act, 42 U.S.C. sec. 4371 (a) (3)).

8b) "Congestion in Urban Areas..." (CEQ Guidelines, Appendix II, p. 7728); and 6(a) (iii), p. 7725).

* As noted, references to Appendix II should be read with heading for Appendix II. (p. 7727, second col.)

ICA, EQIA AND CIRCULAR A-95

9) "Balanced transportation systems, including highway, air, water, pedestrian, mass transit, and other modes for the movement of people and goods ..." (42 U.S.C. sec. 4231 (a) (3)).

Now see:

NEPA AND CEQ GUIDELINES

9) Proper control of transportation (42 U.S.C. sec. 4371 (b) (1)). "Transportation" (CEQ Guidelines, Appendix II, pp. 7727 and 7728).

ICA, EQIA AND CIRCULAR A-95

10) Properly planned community facilities, including utilities for the supply of power, water, and communication, for the safe disposal of wastes, and for other purposes. (42 U.S.C. sec. 4231 (a) (6)).

Now see:

10) "Environmental Aspects of Electric Energy, Generation and Transmission" (CEQ Guidelines, Appendix II, p. 7727); "Natural Gas Energy Development, Transmission and Generation" (id); "Federal Power Commission" (ibid. p. 7729); environmental effect of possible change on population patterns upon

public services of the area in question (ibid, 6 (a) (iii) p. 7725); "solid waste disposal", (ibid, 8 (b), p. 7726); "Sanitation and Waste Systems" (Appendix II, p. 7728).

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11) "Concern for high standards of design" (42 U.S.C. sec. 4231 (a) (7) - manifestly for purposes of

a. Environmental Aesthetics,

b. Building aesthetics,

c. Proper utilization of land,

d. Health and safety.

Now see:

NEPA AND CEQ GUIDELINES

11) "Integrated use of environmental design arts" (42 U.S.C. sec. 4332 (a)); aesthetic factors (42 U.S. C. sec. 4331 (b) (2) ; proper utilization of the resource of land (42 U.S.C. sec. 4331 (b) (5) (6); sec. 4332 (c) (iii); sec. 4331 (1) (2) (4); and health (42 U.S.C. sec. 4331 (b) (2) (3)).

ICA, EQIA AND CIRCULAR A-95

12) The necessity for determining, upon the basis of all the foregoing environmental considerations, criteria and objectives - all of which have their counterparts in NEPA and the CEQ guidelines - whether or not a proposed Federal project will have "a significant impact on area and community development", (42 U.S.C. sec. 4231 (a)) - or, in GSA's words, "a substantial impact on the community" - or, in other words, whether the project is one "significantly affecting the quality of the human environment, "within the meaning of

those words in NEPA - See EQIA, 42 U.S.C. sec. 4371 (b) (1) providing "enhancement of environmental quality", which qualifies ICA.

Now see:

NEPA AND CEQ GUIDELINES

12) The necessity for determining, upon the basis of all the foregoing environmental considerations, criteria and objectives, whether a Federal project is "one significantly affecting the quality of the human environment" (42 U.S.C. sec. 4332 (2) (c)).

ICA, EQIA AND CIRCULAR A-95

13) Consultation and cooperation, and exchange and consideration of all viewpoints, between and among all national, regional, State and local agencies in planning projects, with respect to, among other things, environmental factors and environmental-impact factors (42 U.S.C. sec. 4231 (a) (b)).*

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* These agencies, however, are not environmental agencies (cf. NEPA)

Now See:

NEPA AND CEQ GUIDELINES

13) In the event that the agency determines that a proposed project will

"significantly affect the quality of the human environment", there shall then be consultation and cooperation, and exchange and consideration of all viewpoints, between and maong appropriate national, regional, State and local environmental agencies, concerning environmental factors (42 U.S.C. sec. 4331 (a), 4332 (2) (C) (F); sec. 4331 (4), sec. 4345 (1) (2).

ICA, EQIA AND CIRCULAR A-95

14) "The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in" NEPA (NEPA, sec. 102, opening sentence; 42 U.S.C. sec. 4332, opening sentence).

Now see:

NEPA AND CEQ GUIDELINES

14) Same.

ICA, EQIA AND CIRCULAR A-95

15) Regional, State and local participation in planning of Federal projects and programs shall take into account all viewpoints - national, regional, State and local - "within the framework of national public objectives, as expressed in Federal Law" (42 U.S.C. sec. 4231 (b), to be read with item ("14") directly above, and EQIA, 42 U.S.C. sec. 4371 (b) (1), stating "that there is a national policy for the environment which provides for the "enhancement of environmental quality", a provision applicable to ICA, 42 U.S.C. sec. 4231, because the latter relates to, inter alia, water and land resources,

transportation, and economic and regional development (42 U.S.C. sec. 4371 (b) (1), and cf. 42 U.S.C. 4231).

Now see:

15) "all Federal agencies, to the fullest extent possible, (shall) direct their policies, plans and programs so as to meet national environmental goals" (CEQ Guidelines, par. "1", p. 7724, 1st col.)

REGULATIONS INVOLVED

Executive Order No. 11514; Mar. 5, 1970, 35 Fed.Reg. 4247

Protection and enhancement of environmental quality.

By virtue of the autority vested in me as President of the United States and in furtherance of the purposes and policy of the National Environmental Policy Act of 1969 (Public Law No. 91-190, approved January 1, 1970) (this chapter), it is ordered as follows:

Section 1, Policy. The Federal Government shall provide leadership in protecting and enhancing the quality of

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Executive Order No. 11514

the Nation's environment to sustain and enrich human life. Federal agencies shall initiate measures needed to direct their policies, plans and programs so as to meet national environmental goals. The Council on Environmental Quality, through the Chairman, shall advise and assist the President in leading this national effort.

Sec. 2. Responsibilities of Federal agencies. Consonant with Title I of the National Environmental Policy Act of

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Executive Order No. 11514

1969 (sections 4331-4335 of this title), hereafter referred to as the "Act", the heads of Federal agencies shall:

(a) Monitor, evaluate, and control on a continuing basis their agencies' activities so as to protect and enhance the quality of the environment. Such activities shall include those directed to controlling pollution and enhancing the environment and those designed to accomplish other program objectives which may affect the quality of the

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Executive Order No. 11514

environment. Agencies shall develop programs and measures to protect and enhance environmental quality and shall assess progress in meeting the specific objectives of such activities. Heads of agencies shall consult with appropriate Federal, State and local agencies in carrying out their activities as they affect the quality of the environment.

(b) Develop procedures to ensure the fullest practicable provision of timely public information and understanding of Federal plans and programs with envir-

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onmental impact in order to obtain the views of interested parties. These procedures shall include, whenever appropriate, provision for public hearings, and shall provide the public with relevant information, including information on alternative courses of action. Federal agencies shall also encourage State and local agencies to adopt similar procedures for informing the public concerning their activities affecting the quality of the environment.

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(c) Insure that information regarding existing or potential environmental problems and control methods developed as part of research, development, demonstration, test, or evaluation activities is made available to Federal agencies, states, counties, municipalities, institutions, and other entities, as appropriate.

(d) Review their agencies' statutory authority, administrative regulations, policies, and procedures, including

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Executive Order No. 11514

those relating to loans, grants, contracts, leases, licenses, or permits, in order to identify any deficiencies or inconsistencies therein which prohibit or limit full compliance with the purposes and provisions of the Act. A report on this review and the corrective actions taken or planned, including such measures to be proposed to the President as may be necessary to bring their authority and policies into conformance with the intent, purposes,

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and procedures of the Act, shall be provided to the Council on Environmental Quality not later than September 1,1970.

(e) Engage in exchange of data and research results, and cooperate with agencies of other governments to foster the purposes of the Act.

(f) Proceed, in coordination with other agencies, with actions required by section 102 of the Act (section 4332 of this title).

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EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGMENT AND BUDGET
Washington, D.C. 20503

CIRCULAR NO. A-95(Revised)
February 9, 1971

TO THE HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS

SUBJECT: Evaluation, review and coordination of Federal and federally assisted programs and projects.

1. Purpose. This Circular furnishes guidance to Federal agencies for added cooperation with State and local governments in the evaluation, review, and coordination of Federal assistance programs and projects. The Circular promulgates regulations (AttachmentA)

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CIRCULAR NO. A-95

which provide, in part, for:

a. Encouraging the establishment of a project notification and review system to facilitate coordinated planning on an intergovernmental basis for certain Federal assistance programs in furtherance of section 204 of the Demonstration Cities and Metropolitan Development Act of 1966 and Title IV of the Intergovernmental Cooperation Act of 1968 (Attachment B).

b. Coordination of direct Federal development programs and projects with

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State, regional, and local planning and programs pursuant to Title IV of the Intergovernmental Cooperation Act of 1968.

c. Securing the comments and views of State and local agencies which are authorized to develop and enforce environmental standards on certain Federal or federally assisted projects affecting the environment pursuant to section 102(2) (c) of the National Environmental Policy Act of 1969

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(Attachment C) and regulations of the Council on Environmental Quality.

This Circular supersedes Circular No. A-95, dated July 24, 1969, as amended by Transmittal Memorandum No. 1, dated December 27, 1969. It will become effective April 1, 1971.

2. Basis. This Circular has been prepared pursuant to:

a. Section 401(a) of the Intergovernmental Cooperation Act of 1968 which provides, in part, that

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CIRCULAR NO. A-95

"The President shall . . . establish rules and regulations governing the formulation, evaluation, and review of Federal programs and projects having a significant impact on area and community development..."

and the President's Memorandum of November 8, 1968, to the Director of the Bureau of the Budget ("Federal Register,' Vol. 33, No. 221, November 13, 1968) which provides:

"By virtue of the authority vested in me by section 301 of title 3 of the United

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States Code and section 401(a) of the Intergovernmental Cooperation Act of 1968 (Public Law 90-577), I hereby delegate to you the authority vested in the President to establish the rules and regulations provided for in that section governing the formulation, evaluation, and review of Federal programs and projects having a significant impact on area and community development, including programs providing Federal assistance to the States and localities, to the end that they shall most effectively serve these basic objectives.

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"In addition, I expect the Bureau of the Budget to generally coordinate the actions of the departments and agencies in exercising the new authorizations provided by the Intergovernmental Cooperation Act, with the objective of consistent and uniform action by the Federal Government."

b. Title IV, section 403, of the Intergovernmental Cooperation Act of 1968 which provides that:

"The Bureau of the Budget, or such other agency as may be designated by the President, shall prescribe such rules

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and regulations as are deemed appropriate for the effective administration of this Title."

c. Section 204 (c) of the Demonstration Cities and Metropolitan Development Act of 1966 which provides that:

"The Bureau of the Budget, or such other agency as may be designated by the President, shall prescribe such rules and regulations as are deemed appropriate for the effective administration of this section," and

d. Reorganization Plan No. 2 of 1970 and Executive Order No. 11541 of July 1,

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1970, which vest all functions of the Bureau of the Budget or the Director of the Bureau of the Budget in the Director of the Office of Management and Budget.

3. Coverage. The regulations promulgated by this Circular (Attachment A) will have applicability to:

a. Under Part I, all projects (or significant changes thereto) for which Federal assistance is being sought under the programs listed in Attachment D. Limitations and provision for exceptions are noted therein.

b. Under Part II, all direct Federal

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development activities, including the acquisition, use, and disposal of Federal real property.

c. Under Part III, all Federal programs requiring, by statute or administrative regulation, a State plan as a condition of assistance.

d. Under Part IV, all Federal programs providing assistance to State, local, and regional projects and activities that are planned on a multijurisdictional basis.

4. Inquiries. Inquiries concerning this Circular may be addressed to the Office

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of Management and Budget, Washington, D.C. 20503, telephone (202) 395-3031 (Government dial code 103-3031).

George P. Shultz
Director

PART II: DIRECT FEDERAL DEVELOPMENT

1. Purpose. The purpose of this Part is to:

a. Provide State and local government with information on projected Federal development so as to facilitate coordination with State, regional and local plans and programs.

b. Provide Federal agencies with information on the relationship of proposed

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direct Federal development projects and activities to State, regional, and local plans and programs; and to assure maximum feasible consistency of Federal developments with State, regional, and local plans and programs.

c. Provide Federal agencies with information on the possible impact on the environment of proposed Federal development.

2. Coordination of direct Federal development projects with State, regional, and local development.

a. Federal agencies having responsibility for the planning and construction

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of Federal buildings and installations or other Federal public works or development or for the acquisition, use, and disposal of Federal land and real property will establish procedures for:

(1) Consulting with Governors, regional and metropolitan clearinghouses, and local elected officials at the earliest practicable stage in project or development planning on the relationship of any plan or project to the development plans and programs of the State, region, or localities in which the project is to be located.

(2) Assuring that any such Federal plan

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or project is consistent or compatible with State, regional, and local development plans and programs identified in the course of such consultations. Exceptions will be made only where there is clear justification.

(3) Providing State, metropolitan, regional, and local agencies which are authorized to develop and enforce environmental standards with adequate opportunity to review such Federal plans and projects pursuant to section 102(2) (C) of the National Environmental Policy Act of 1969. Any comments of such agencies will accompany the environmental impact

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statement submitted by the Federal agency.

3. Use of clearinghouses. The State, regional, and metropolitan planning and development clearinghouses established pursuant to Part I will be utilized to the greatest extent practicable to effectuate the requirements of this Part. Agencies are urged to establish early contact with clearinghouses to work out arrangements for carrying out the consultation and review required under this Part, including identification of types of projects considered appropriate for consultation and review.

REGULATIONS INVOLVED

G.S.A. ORDER, PBS 1095.1A

ATTACHMENT B

1. Determination of what is a "major Federal action significantly affecting the quality of the human environment." This is in large part a judgment based on the circumstances of the proposed action, and the determination shall be included as a normal part of the decision-making process.

a. Types of major Federal actions requiring environmental statements include:

REGULATIONS INVOLVED

G.S.A. ORDER, PBS 1095.1A

ATTACHMENT B

(1) Recommendations or reports relating to legislation with a significant environmental impact, including prospectuses for proposed new Federal buildings under the Public Buildings Act;

(2) Administrative actions such as projects and continuing activities with a significant environmental impact supported in whole or in part by a Federal agency through contracts which include procurement of space through

REGULATIONS INVOLVED

G.S.A. ORDER, PBS 1095.1A

ATTACHMENT B

lease-construction for Federal agency use, construction, repair and alteration of public buildings; and use of Government-owned property through lease, permit, or license;

(3) Establishment of environmental policy including regulations and procedures;

(4) Actions with significant environmental impact initiated as a result of projects or programs started prior to

REGULATIONS INVOLVED

G.S.A. ORDER, PBS 1095.1A

ATTACHMENT B

January 1, 1970, the date of enactment of the Act; and

(5) Any proposed action which is likely to be environmentally controversial.

b. Actions significantly affecting the human environment can be construed to be those that;

(1) Degrade environmental quality even if beneficial effects outweigh the detrimental ones;

REGULATIONS INVOLVED

G.S.A. ORDER, PBS 1095.1A

ATTACHMENT B

(2) Curtail range of possible beneficial uses of the environment including irreversible and irretrievable commitments of resources;

(3) Serve short-term rather than long-term environmental goals;

(4) May be localized in their effect, but nevertheless, have a harmful environmental impact; and

(5) Are attributable to many small actions, possibly taken over a period of

REGULATIONS INVOLVED

G.S.A. ORDER, PBS 1095.1A

ATTACHMENT B

time, that collectively have an adverse impact on the environment.

c. Environmental subject areas include, but are not limited to:

(1) Ecological systems such as wildlife, fish, and other marine life;

(2) Human population distribution changes and its effect upon urban congestion (including vehicular traffic), water supply, sewage treatment facilities, other public services, and threats to

REGULATIONS INVOLVED

G.S.A. ORDER, PBS 1095.1A

ATTACHMENT B

health;

(3) Actions which directly and indirectly affect human beings through water, air, and noise pollution, and undesirable land use patterns; and

(4) Actions which impact upon the historic,cultural, and natural aspects of our national heritage.

G.S.A.'s Letter to Governor Rockefeller

"August 20, 1971
Honorable Nelson A. Rockefeller
Governor of New York State
Albany,New York

Dear Governor Rockefeller

'The General Services Administration has completed negotiations with the City of New York to acquire approximately 1.20 acres of land bounded by Cardinal Hayes Place, Park Row, Pearl and Duane Streets, Manhattan, New York, directly east of the U.S. Courthouse at Foley Square. This parcel relates to Senate Bill S6354 (A7531) passed on

June 4, 1971, and signed by you on June 29, 1971, to amend the administrative code of the City of New York, in relation to authorizing the said City to discontinue the areas as a public place. It is planned to construct an Annex on this site consisting of a two-building complex connected by a bridge to the existing U.S. Courthouse, Foley Square, New York, New York. One of the buildings will provide approximately 147,430 sq. ft. of space for the Department of Justice, U.S. Attorney,

U.S. Marshal, and the Attorney General's Strike Force. This building will house approximately 357 federal employees, most of whom are already employed in the general area.

The other building will provide approximately 197,100 sq. ft. of space for the Department of Justice Correction Center and will house approximately 64 staff personnel presently employed in the general area, with a capacity to house up to 464 detainees awaiting trial and disposition.

Plans for this complex provide for connection to existing New York City utility services, including water supply, sewage disposal, solid waste disposal, and storm water drainage. Heating will be purchased from Con Edison Company of New York, and trash removal will be by commercial contract. The Intergovernmental Cooperation Act of 1968, and administrative directives of the President, direct that there be consultation with the appropriate officials in the planning of any

federal project which may have a substantial impact on the community. Therefore, we would appreciate your cooperation and comments in this endeavor.

Sincerely,

(signed) Gerald J. Turetsky

GERALD J. TURETSKY
Regional Administrator

CC:

Official File - 2 PR
Reading - 2P
Tri-State Transportation Commission,
100 Church St., NYC
GJ Turetsky - 2A(2)
GM Paduano - 2P(2)

2PX:EB Wasielewski/2PPA:DMader/eap
8/12/71 X4284

qPX		2PPA	
EBWasielewski		DMader	
2PR		2P	
SDBeck		GMPaduano*	"

* Regional Director of the Public Buildings Service of GSA, Hanly v. Mitchell, 460 F2d, at, 465.

G.S.A.'s Letter to Mayor Lindsay.

"August 20, 1971
Honorable John V. Lindsay
Mayor of New York
New York, New York

Dear Mayor Lindsay:

'The General Services Administration has completed negotiations with the City of New York to acquire approximately 1.20 acres of land bounded by Cardinal Hayes Place,Park Row, Pearl and Duane Streets, Manhattan, New York, directly east of the U.S. Courthouse at Foley Square. This parcel relates to Senate Bill S6354 (A7531) passed on June 4, 1971, and signed by you on June 29, 1971, to amend the administra-

tive code of the City of New York, in relation to authorizing the said City to discontinue the area as a public place. It is planned to construct an Annex on this site consisting of a two-building complex connected by a bridge to the existing U.S. Courthouse, Foley Square, New York, New York. One of the buildings will provide approximately 147,430 sq. ft. of space for the Department of Justice, U.S. Attorney, U.S. Marshal, and the Attorney General's Strike Force. This building will house approximately 357 federal employees, most of whom are already employed in the general area.

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Sincerely,

(signed) Gerald J. Turetsky

GERALD J. TURETSKY
Regional Administrator

CC:

Official File - 2 PR
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100 Church St., NYC
GJ Turetsky - 2A(2)
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2 PX:EB Wasielewski/2PPA:DMader/eap 8/12/71 X4284

qPX	2PPA
EBWasielewski	DMader
2PR	2P
SDBeck	GMPaduano* "

*Regional Director of the Public Buildings Service of GSA, Hanly v Mitchell, 460 F2d, at,465

PERTINENT PROVISIONS OF GSA'S PROSPECTUS (SUBMITTED TO THE COMMITTEES ON PUBLIC WORKS OF THE SENATE AND HOUSE OF REPRESENTATIVES, RESPECTIVELY) FOR APPROVAL OF CONSTRUCTION OF THE OFFICE BUILDING CONSTRUCTION OF THE OFFICE BUILDING PORTION OF THE COURTHOUSE ANNEX (PUBLIC BUILDINGS ACT. OF 1959; 40 U.S.C. Sec.606N)

PROJECT NUMBER:31-0323

PROSPECTUS FOR PROPOSED CONSTRUCTION UNDER THE PUBLIC BUILDINGS ACT OF 1959

FOLEY SQUARE COURTHOUSE ANNEX

NEW YORK, NEW YORK

1. DESCRIPTION OF PROPOSED PROJECT:

The project contemplates the construction of an Annex to the Foley Square Courthouse to provide space for the

GSA'S PROSPECTUS TO CONGRESS FOR OFFICE BUILDING

Department of Justice, U.S. Attorney. U.S. Marshal, and the Attorney General Strike Force, on a site to be acquired.

Approximate Area: Gross - 127,00 sq.ft. Net - 93,500 sq. ft.

2. ESTIMATED MAXIMUM COST OF PROJECT:

a. Design, management and inspection..

$ 1,225,000

b. Construction (As of June 1972).....

$ 10,700,000

Total estimated maximum cost.$11,925,000

3. JUSTIFICATION:

The Omnibus Judgeship Bill of 1970 authorized three new judges for the Southern District of New York. Space is not

available for these Judges. In addition, there is already a shortage of space for holding sessions of court and facilities will be required for the use of the judges who will become eligible for senior status over the next few years. There is also a lack of space for hearing rooms and chambers for five additional U.S. Magistrates to be appointed in the near future.

As a result, the U.S. District Court requires about 35,000 square feet of space for expansion in the Foley Square Courthouse building and the only

GSA'S PROSPECTUS TO CONGRESS FOR OFFICE BUILDING

feasible manner in which this space can be provided is to relocate the U.S. Attorney's office from the building. The Bureau of Prisons also has a critical need for a new and expanded Correctional Center and has been conducting site surveys in the Metropolitan New York area for several years. A project for a Correctional Center of about 120,000 square feet with a construction cost of approximately $15,000,000 was recently authorized by the appropriate Committees of the

GSA'S PROSPECTUS TO CONGRESS FOR OFFICE BUILDING

Congress. (emphasis supplied)*

3. A site has been selected which is located directly southeast of the U.S. Courthouse and is bounded by Cardinal Place, Park Row, Pearl and Duane Streets. This site, of about 48,000 square feet is contiguous to the Courthouse at Foley Square, and offers location and operational advantages to the Bureau of Prisons, the U.S. Attorney,

* The Bureau of Prisons - not GSA - submitted the report or recommendations (termed a "justification") to Congress for approval of and funds for the prison. H.Rep. 91-1072; hearings of Senate Judiciary Committee, Subcommittee on State, Justice, Commerce and Judiciary (June 9, 1970;p.316) (Matter in footnote added).

GSA'S PROSPECTUS TO CONGRESS FOR OFFICE BUILDING

the U.S. Marshal and the courts which far exceed any other location. Participation at this time with the Bureau of Prisons will make it possible to secure the same location advantages for other Government activities concerned and also result in the maximum use of the selected site. The proximity of the Courthouse to the site will also permit the construction of a tunnel or bridge to connect the structures and allow individuals to be conducted from one building to another. (emphasis added).

GSA'S PROSPECTUS TO CONGRESS FOR OFFICE BUILDING

We will attempt to acquire the site from the city of NewYork by applying the agreed value of the selected site as a credit against the city's mortgaged indebtedness to the Government. However, failing in that, other methods of acquisition will be pursued. In the event it is necessary to acquire the selected site by purchase the total estimated project cost would be increased by about $4,000,000. The requirements of the Bureau of Prisons are of a special purpose nature, therefore they are not a part of this prospectus.

GSA'S PROSPECTUS TO CONGRESS FOR OFFICE BUILDING

Provision has been made in the estimated project cost for fallout protection in the building in accordance with Office of Civil Defense Technical Standards for Fallout Shelters issued April 1969.

.....

GSA'S FINAL DETERMINATION

UNITED STATES OF AMERICA
GENERAL SERVICES ADMINISTRATION
Washington, D.C. 20405

DATE: April 3, 1973

REPLY TO ATTN OF: Acting Deputy
Administrator for Special Projects-P

SUBJECT: Supplement to PBS Assessment of
Environmental Impact Statement - U.S.
Courthouse Annex - Project No. 31-0323
New York, New York

Gerald J. Turetsky - 2A
Regional Administrator, GSA

We have reviewed the attached Supplement of March 28, 1973, to the environmental assessment dated June 5, 1972. The supplement was prepared by the New York regional office of GSA-PBS in accordance with the decision of December 5, 1972, of the U.S. Court of Appeals for the Second Circuit in the case of Hanly et

GSA'S FINAL DETERMINATION

al. vs Kleindienst et al, Docket No. 72-1959.

After considering the supplement and all exhibits (1 thru 14) prepared, I confirm the previous determination of June 7, 1972, that the construction, operation and maintenance of subject project, which includes the Metropolitan Correctional Center, is not considered a major Federal action significantly affecting the quality of the human environment.

(signed)
CONCURRED Andrew E Kanden April 3, 19
Director, Environmental Affairs 73

APPROVED L.H. Rorsch(signed) 4/3/73
Acting Deputy Administrator for Special Projects

Enclosure

COVERING MEMORANDUM IN REFERENCE TO GSA'S FINAL DETERMINATION

UNITED STATES OF AMERICA
GENERAL SERVICES ADMINISTRATION
PUBLIC BUILDINGS SERVICE

Region 2
26 Federal Plaza
New York, N.Y. 10007

DATE: March 28, 1973

REPLY TO ATTN. OF: Operational Planning-2PG

SUBJECT: Supplement to PBS Assessment of Environmental Impact U.S. Courthouse Annex - Project No. 31-0323 New York, New York

Assistant Commissioner for Operational Planning - PG

Attached is Supplement to the PBS Assessment of Environmental Impact for subject project containing additional findings and information prepared in accordance with the decision dated

COVERING MEMORANDUM IN REFERENCE TO GSA'S FINAL DETERMINATION

December 5, 1972, of the U.S. Court of Appeals for the Second Circuit in the case of Hanly et al vs. Kleindienst et al, Docket No. 72-1959.

After consideration of all the attached information, I reaffirm my previous determination that the construction and operation of subject project which includes the construction of the Metropolitan Correctional Center is not an action which will significantly affect the quality of human environment.

ROBERT K. BOGARDUS
Regional Commissioner

Attachment

PREAMBLE TO GSA'S SUPPLEMENTARY FINDINGS

SUPPLEMENTARY FINDINGS
Assessment of Environmental Impact
U.S. Courthouse Annex
New York, New York

In accordance with the provisions of the National Environmental Policy Act of 1969, an Assessment of Environmental Impact was filed by GSA June 7, 1972, and submitted to the U.S. District Court in accordance with the decision of the Court of Appeals for the 2nd Circuit, to an action filed by Denis Hanly et al against Richard C. Kleindienst et al. The District Court held that GSA had reasonably concluded that the Metropolitan Correctional Center Building would not significantly affect the quality of the environment, but a further action

PREAMBLE TO GSA'S SUPPLEMENTARY FINDINGS

taken by the Plaintiffs to the United States Court of Appeals was partially upheld by that Court. The Circuit Court in its decision dated December 5, 1972, remanded the case for the purpose of requiring GSA to make further investigation of certain factual issues raised by the Plaintiffs with directions to accept from plaintiffs any further evidence as may be proffered.

To carry out the directive of the Court, GSA immediately scheduled a Public Meeting after due and sufficient notice to all concerned parties. The announced objective of the meeting was to hear new evidence relating to the environmental impact of the Metropolitan Correctional

PREAMBLE TO GSA'S SUPPLEMENTARY FINDINGS

Center Building.

The Notice of the Public Meeting was sent to community leaders, local associations, Plaintiffs and their Attorneys and Community Board Chairmen. The general community was notified by a notice placed in local newspapers for two days as well as by notices posted on the bulletin boards of the local Post Office Building, The Chatham Green Apartments and The Chatham Towers Apartments.

The active attendance of all concerned persons was requested, but in the event this was not possible, the submission of written statements regarding the matter at hand was solicited relating to the

PREAMBLE TO GSA'S SUPPLEMENTARY FINDINGS

Environmental Impact of the Metropolitan

Correction Center.

Among the prominent community leaders

present were the following:

Fr. Denis Hanly,
Pastor, Transfiguration Church

Frank Mosco,
Pres., Holy Name Society Transfiguration Church

Sien Wei Liu

Mrs. Rose Muscio,
Chairman, Community Board #3

Henry Chung,
Pres., Chinese Benevolent Assn. (Spoke thru interpreter)

Roy Schillinger,
Chairman, Chatham Sq. Civic Ctr.Comm.

Robert McDevitt,
Resident Chatham Towers

Chas. Cogan,
Past Pres., United Federation of Teachers

PREAMBLE TO GSA'S SUPPLEMENTARY FINDINGS

Alfred Julien,
Attorney for Plaintiffs

A written transcript of the proceedings was made and is annexed as Exhibit 4.

Exhibits:

1) Notice of Public Meeting
2) Distribution of Notices etc.
3) Copies of letters received
4) Transcription of Public Meeting
5) List of persons who attended Public Meeting.

In further carrying out the directive of the Court, the GSA has made the following supplementary findings with respect to the issues pointed out by the Court and those raised by Sien Wei Liu, a plaintiff, in his affidavit and questions raised at the Public Meeting.

ADDITIONS TO RECORD OF PUBLIC HEARINGS, ADDED BY G.S.A., EX PARTE, AFTER CONCLUSION OF HEARINGS

GRUZEN & PARTNERS
Formerly
KELLY & GRUZEN
Architects Planners Engineers
1700 Broadway
New York, N.Y. 10019
(Area - 212) 582-7040

24 Commerce Street
Newark, NJ 07102
(Area 201) 643-1944

March 7, 1973

General Services Administration
Public Building Service
Design & Construction Division
26 Federal Plaza
New York, New York 10007

Attention: Mr. Herbert Steinman

Reference: Foley Square Courthouse Annex
Project No. 31-0323
GS-02B-16,291 (NEG), J-1077-8
MCC Sight-Lines From Housing Projects

Gentlemen:

Enclosed herewith pursuant to your

EX PARTE ADDITIONS BY GSA TO RECORD OF PUBLIC HEARING

request that we investigate the possibility of sighting inmates on the MCC's recreational roof decks from the adjacent housing project's upper floors, are copies of Investigation sketches 3773A (Plan) and 3773B (Sections) dated 7 March 1973.

"View A" indicates sight-lines from CHATHAM TOWERS. Note that a person of normal height standing on the top most (25th) floor of the apartment nearest to the MCC site might possibly see the top of an inmate's head if the inmate were ± 6 feet tall and standing against the 20' high enclosing wall.

EX PARTE ADDITIONS BY GSA TO RECORD OF PUBLIC HEARING

"View B" indicates sight-lines from CHATHAM GREEN. Only the upper few feet of the inside face of the enclosing wall can be seen from this project. Inmates will not be visible.

It must also be noted that the recreation enclosures are not completely free and open to the sky. Steel joist framing and bracing members reduce the open top of the enclosure to a grid work of 5' x 3" by 9'-6" panels. A net or mesh of stainless steel wire of 6" by 6" openings will be welded to the aforementioned framing--hence, inmate visibility is even less of a possibility.

Very truly yours,

Gordon Vance
Associate

GV:gsa

Enclosure

cc: LF, File

EX PARTE ADDITIONS BY GSA TO RECORD OF PUBLIC HEARING

GRUZEN & PARTNERS
Formerly
Kelly & GRUZEN
Architects Planners Engineers
1700 Broadway
New York, N.Y. 10019
(Area - 212) 582-7040

24 Commerce Street
Newark, NJ 07102
(Area 201) 643-1944

March 8, 1973

General Services Administration
26 Federal Plaza
New York, New York 10007

Att: Mr. Herbert Steinmen, Contracting Offices
Re: Foley Square Courthouse Annex 2PCO: PCR - Project No. 31-0323, GS-028 - 16,291

Gentlemen:

As per your request we are writing this letter to further clarify the character-

istics of subject project which are designed to conform to cornice lines of adjacent civic buildings, thereby helping to integrate the new structure aesthetically into its environment. Of course, it should be understood that with the contemporary design idion of the new annex it was never intended that we mimic or copy existing cornices. Rather than that, our goal was to provide at approximately the same height as existing cornices, horizontal bands that would be perceived as a reflection of the cornice lines. This goal was achieved.

Our primary focus for this effort was at

the south end of the project where the entrance to the U.S. Attorney Building came directly off of the new civic plaza that was under construction when we started this project. At this point the new building was most closely related to the existing civic buildings and the St. Andrews R.C. Church. The north end of the project was more open and our design at this portion was partly influenced by the vertical lines of Chatham Towers as well as the program requirements for the M.C.C. Building.

There are two major horizontal lines on existing buildings adjacent to the south plaza. The most dominate line with

respect to the new building is the collonade of St. Andrews Church because it is the closest and because its deep shadows are more pronounced than those of the other cornices. One of the primary design features of the U.S. Attorney Building is its open collonade with a soffit at approximately the same level as the church collonade soffit. It should be readily apparent to even the most unsophisticated eyes that these adjacent buildings have a uniformity of collonade heights and thus a harmony of form even though they are of quite different architectural styles, each a product of the culture and technology of

EX PARTE ADDITIONS BY GSA TO RECORD OF PUBLIC HEARING

the time they were built.

The other major horizontal line, about two stories higher, is the projecting cornices of the Municipal Building and the Federal Courthouse. This line is reflected in the deep horizontal recess that is made by setting the windows at the sixth floor of the U.S. Attorney Building about two and a half feet back from the face of the building. The windows of other floors (with one exception mentioned later) are flush with the face of the building.

The two horizontal lines are carried around the Park Row facade to the extent possible within given conditions

including that of the existing Transit Authority sub-station which is maintained on the site but which is not as high as the 6th floor line. The other exception of windows at face of the of U.S. Attorney Building is the 3rd floor where they are also recessed as on the 6th floor to extend the horizontal line created by the south collonade.

There should be no question that we recognized the existing building cornie lines and carried them into the new project. The Office of Lower Manhattan Development confirmed this when they approved our preliminary design after

disapproving an earlier concept which did not include these features.

Very truly yours,

GRUZEN & PARTNERS

Lloyd Fleischman, AIA
Partner

LF:sl

CC: JLF, PSa, GV

EX PARTE ADDITIONS BY GSA TO RECORD OF PUBLIC HEARING

GRUZEN & PARTNERS
Formerly
KELLY & GRUZEN
Architects Planners Engineers
1700 Broadway
New York, N.Y. 10019
(Area-212) 582-7040

24 Commerce Street
Newark, NJ 07102
(Area 201) 643-1944

March 9, 1973

General Services Administration
Public Buildings Service
Design & Construction Division
26 Federal Plaza
New York, New York 10007

Attention: Mr. Herbert Steinman
Reference: Foley Square CourthouseAnnex
Project No. 31-0323
GS-02B-16,291 (NEG)
J-1077-8

Gentlemen:

EX PARTE ADDITIONS BY GSA TO RECORD OF PUBLIC HEARING

In response to GSA's request for a recapitulation of our investigation and processing of NYC zoning data for the Foley Square Courthouse Annex project, please note the following:

A proposed project's zoning calculations normally involve three principal factors;

a) Floor Area Ratio (amount of floor area that can be built in relation to the amount of actual lot area).

b) Normal building wall setback and height requirements.

c) The "sky exposure plane" (which forms a limiting construction envelope or volume).

EX PARTE ADDITIONS BY GSA TO RECORD OF PUBLIC HEARING

A total lot area of 51,284 square feet multiplied by a F.A.R. ratio of 6 allows for a building area of 307,704 square feet. Bonuses for designed plazas and arcade areas applied to this floor area bring the allowable building area to a total of 350,500 square feet.

The total applicable floor area as designed (gross area minus cellars, mechanical spaces, etc.) is within the allowable permitted square foot area.

In an effort to meet with the Office of Lower Manhattan Development's Civic Center Master Plan design requirements and the particular functional and program

EX PARTE ADDITIONS BY GSA TO RECORD OF PUBLIC HEARING

requirements of the Department of Justice, it became necessary to vary from the "sky exposure plane" and the building wall setback / heigh requirements.

See attached Gruzen & Partner's letters of January 25, 1972 to Deputy Building Commissioner Walsh and of March 21, 1972 to the Board of Standards and Appeals. The City replies of February 29, 1972 and March 27, 1972 are also attached. Note that Chairman Becker of the Board of Standards and Appeals advises that although the project is not within the City's jurisdiction, the Board "would be inclined toward a favorable action"

if this matter was presented for review.

See attached a memo of June 23, 1971 pursuant to an early meeting with the Office of Lower Manhattan wherein the envelope penetration was pointed out.

Very truly yours,

Gordon Vance

GRV:lon
enclosures
cc: LF

EX PARTE ADDITIONS BY GSA TO RECORD OF PUBLIC HEARING

GRUZEN & PARTNERS
Formerly
KELLY & GRUZEN
Architects Planners Engineers
1700 Broadway
New York, N.Y. 10019
(Area-212) 582-7040

24 Commerce Street
Newark, N.J. 07102
(Area 201) 643-1944

March 14, 1973

General Services Administration
Public Buildings Service
26 Federal Plaza
New York, New York 10007

Attention: Mr. H.S. Steinman, Director
Design and Construction Division

Reference: Foley Square Court HouseAnnex
Phase II, GS-02B-16, 801 J-1077
Court House Bridges

Gentlemen:

The following is in response to your

request pursuant to the imposition of the new Court House Bridges upon the environmentof Cardinal Hayes Place:

A. DESIGN DATA

Both the U.S. Attorney Building bridge and the bridge from the correctional center span Cardinal Hayes Place approximately 39 feet above the middle of the road bed. The diagonal spans are respectively 90 and 82 feet in length. The legal street width at the bridge locations is about 25 feet. The out-to-out width of each bridge is 8'-8"; the height 15'-0".

Both new buildings set back from Cardinal Hayes (the previous - now demolished-buildings were built to the property

line) providing a wider street area than ever existed.

B. FACTORS OF "LIGHT" AND "AIR"

The fact that the bridges are narrow in width and that they are four (residential) floors above the street makes it difficult to accept an argument that their presence would decrease the availability of sunlight or air at the pedestrians' level. The light reflecting surface colors of the old Court House and the new buildings coupled with the fact of an increased ground area at the street are also plus factors. New sodium-vapor street lights in combination with the above noted conditions will make

EX PARTE ADDITIONS BY GSA TO RECORD OF PUBLIC HEARING

the nighttime street like day.

In short, the pedestrian in Cardinal Hayes Place, rather than being detrimented by the new structure, will enjoy upon their completion, a safer, wider, newly surfaced, cleaner and well lighted thoroughfare.

Very truly yours,

Gordon R. Vance

GRV:s

EX PARTE ADDITIONS BY GSA TO RECORD OF PUBLIC HEARING

THE CITY OF NEW YORK
Office of the Mayor
Office of Lower Manhattan Development
2 Lafayette Street, New York, NY 10007

Richard Weinstein, Director

March 7, 1973

Mr. Herbert Steinman
Design & Construction Division
General Services Administration
26 Federal Plaza
New York, New York 10007

Dear Mr. Steinman:

A major feature of The Lower Manhattan Plan, which was published in 1966, is the proposal to create a pedestrian precinct throughout the Civic Center area. It is intended, eventually, to eliminate all vehicular traffic (except deliveries to a few buildings) and all

on-street parking from the area bounded by Broadway, Park Row and Worth Street. The streets will be replaced by new paving and grass, more trees will be planted, and benches installed. The result will be a larger, more attractive and more useful City Hall Park and Foley Square. The new police headquarters building and the Federal Courthouse Annex are providing the first portions of this pedestrian precinct. As a result of these two projects, portions of Chambers and Duane Streets and all of Cardinal Hayes Place will be closed to vehicles and rebuilt for pedestrians. The result should be an attractive stimulus towards

achieving the rest of the plan for the

Civic Center

Sincerely,

Richard Weinstein
Director

EX PARTE ADDITIONS BY GSA TO RECORD OF PUBLIC HEARING

UNITED STATES OF AMERICA
GENERAL SERVICES ADMINISTRATION
PUBLIC BUILDINGS SERVICE

REGION 2
26 Federal Place
New York, New York 10007

March 14, 1973

Mr. E. Geoffrey High
Administrator
Beekman Downtown Hosp ital
New York, New York 10007

Dear Mr. High:

This is to confirm the substance of our conversation during my visit with you and our phone conversation on March 14, 1973.

As I explained to you, General Services Administration is in the process of constructing an Annex to the U.S. Courthouse Building in Foley Square, one

EX PARTE ADDITIONS BY GSA TO RECORD OF PUBLIC HEARING

building to house the U.S. Attorney related activities and the other building is to be a Metropolitan Correctional Center.

In checking on the availability of community facilities in this area the question of health facilities was raised. It is my understanding after my discussion with you that in the Beekman Downtown Hospital the present availability of beds is sufficient to take care of present conditions except in specialized areas. Plans are on the board to expand the facilities of the hospital to take care of the rapidly increasing residential population but

EX PARTE ADDITIONS BY GSA TO RECORD OF PUBLIC HEARING

that all the funds for this purpose are not available at this time. It was also noted that Beekman Downtown Hospital has a reputation and record for having one of the finest emergency wards in the city and that if the Government had occasion to need approximately 4 to 6 beds for emergency purposes during any one month that this need would not overtax the present facilities.

Your cooperation in providing the information requested in this matter is greatly appreciated.

Sincerely,

ALEXANDER G. McCABE
Special Assistant to Regional Commissioner - Public Buildings Service

EX PARTE ADDITIONS BY GSA TO RECORD OF PUBLIC HEARING

HOSPITAL IMPACT STATEMENT

It is the policy of the U.S. Bureau of Prisons to provide medical, dental and surgical treatment care for all offenders committed to its custody through in house facilities where practical. The New York Metropolitan Correctional Center will have complete infirmary services available; major medical and surgical problems will continue to be referred to the Bellvue Medical Center where appropriate security wards are available. The total major medical and surgical impact will approximate four cases per month. In exceptional cases, where danger to an inmates life appears

EX PARTE ADDITIONS BY GSA TO RECORD OF PUBLIC HEARING

to be extremely imminent, a closer

medical facility would be used

SUPREME COURT, U.S.
FILED
MAR 25 1974
MICHAEL RODAK, JR., CLERK

No. 73-913

In the Supreme Court of the United States

OCTOBER TERM, 1973

DENIS HANLY, ET AL., PETITIONERS

v.

WILLIAM B. SAXBE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

Department of Justice,
Washington, D. C. 20530.

In the Supreme Court of the United States

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v.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioners contend that the National Environmental Policy Act requires the General Services Administration to prepare an environmental impact statement considering the effect of the construction of a jail in New York City. They allege that there is a conflict in the circuits concerning the test to be applied in identifying major federal actions which significantly affect the environment and thus require

an impact statement; they also contend that GSA has acknowledged that the construction of the jail would significantly affect the environment, and that they are entitled to an adversary hearing on the question of the jail's effect on the environment.

This case arises from the determination by the General Services Administration (GSA) that the construction of a jail as an addition to the Foley Square courthouse area in lower Manhattan would not have a significant effect on the local human environment, and that the jail could therefore be built without the filing of a detailed environmental impact statement under Section 102(2)(C), of the National Environmental Policy Act of 1969, 42 U.S.C. 4332(2)(C). The petitioners challenge that factual determination. In earlier stages of this case, they sought injunctive relief to halt construction of the jail pending GSA's issuance of the full scale statement petitioners assert must be filed on this project. Petitioners succeeded in their first two appearances in the Second Circuit in requiring GSA to amplify its explanation of the considerations on which its "no impact" finding was based. Petitioners each time unsuccessfully sought certiorari without awaiting further proceedings in the district court, primarily because construction has never been stayed. See *Hanly* v. *Mitchell*, 460 F.2d 640, certiorari denied *sub nom. Hanly* v. *Kleindienst*, 409 U.S. 990 (*Hanly I*); *Hanly* v. *Kleindienst*, 471 F.2d 823, certiorari denied, 412 U.S. 908 (*Hanly II*).

The district court has now granted the respondents' motion for summary judgment; it determined that GSA has complied with NEPA in concluding, on the basis of appropriate procedures and findings, that no significant impact on the human environment in the Foley Square area will result from the construction of the jail (App. A, *infra*). The court of appeals affirmed (Pet. App. 5a-13a).

The decision of the court of appeals is correct, and does not conflict with the decision of any other court of appeals.

Petitioners contend that there is a serious conflict among the circuits concerning the interpretation of 42 U.S.C. 4332(2)(C), which requires environmental impact statements for "major Federal actions significantly affecting the quality of the human environment." The conflict, petitioners assert, concerns whether this language "constitutes a two-test standard—i.e., (1) is the action 'major'? and (2) does it 'significantly affect the quality of the human environment'?—or is it a unitary or single test standard 'major' and 'significantly' etc. being used together for emphasis?" (Pet. 44). Petitioners do not explain why this alleged conflict is significant. The cases cited by petitioners as supporting the "unitary" test simply assume without discussion that the federal action involved is one that requires a finding regarding environmental impact (see cases cited at Pet. 48-50). But even if they could be read as indicating that an agency must consider whether *any* of its actions will significantly affect the environment, no con-

flict with the instant decision would be shown, since both courts below found that GSA did properly consider that question and properly concluded that there will be no significant effect.

Petitioners contend that letters sent by GSA to city and state officials concerning this project acknowledged that the jail would significantly affect the environment, and that the agency's contrary findings in the reports reviewed by the courts below therefore should have been ignored. The letters, however, made no findings, under either NEPA or the Intergovernmental Cooperation Act. They simply referred to the latter Act and its implementing directives which, they stated, "direct that there be consultation with the appropriate officials in the planning of any federal project which may have a substantial impact on the community" (Pet. App. 10a-11a, n. 1). As the court of appeals notes, however, this was not in any sense a formal GSA finding that the jail *would* have such an impact. It is thus not necessary in this case to consider whether a finding under the Intergovernmental Cooperation Act is the equivalent of a finding under NEPA.

Finally, petitioners contend that it was improper for GSA to base its decision concerning the lack of any significant environmental impact on material which was not presented at the public hearing held to permit the submission of community views. As the courts below held, however, *Hanly II* did not indicate that petitioners are entitled to an adversary type hearing. Instead, the court of appeals specifi-

cally stated that GSA might conclude that public participation limited to the agency's "informal acceptance of relevant data" would be sufficient. *Hanly* v. *Kleindienst*, 471 F.2d 823, 836 (C.A. 2); cf. *Jicarilla Apache Tribe of Indians* v. *Morton*, 471 F.2d 1275, 1284 (C.A. 9); *National Helium Corp.* v. *Morton*, 455 F.2d 650, 656 (C.A. 10). Petitioners were given an adequate opportunity to present their views and provide the agency with additional relevant information. As both courts below concluded, no more is required.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1974.

APPENDIX

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

72 Civ. 716

DENIS HANLY, ET AL., PLAINTIFFS

—against—

RICHARD G. KLEINDIENST, ETC., ET AL., DEFENDANTS

MEMORANDUM

TENNEY, J.

This case is now before the Court for a third time on plaintiffs' motion for a preliminary injunction, pursuant to Fed. R. Civ. P. 65, enjoining the construction of the Metropolitan Correction Center (hereinafter "MCC").[1] In addition, defendants have now moved for summary judgment pursuant to Fed. R. Civ. P. 56 with regard to plaintiffs' cause of action for injunctive relief. For the reasons set out *infra* plaintiffs' motion is denied and defendants' motion is granted.

Since the factual and procedural history of the action is thoroughly documented in two district court and two circuit court opinions, this Court will confine itself to a brief review of the facts relevant to

---

[1] The Court of Appeals, in *Hanly* v. *Mitchell*, 460 F.2d 640 (2d Cir.), *cert. denied*, 409 U.S. 990 (1972), affirmed this Court's denial of plaintiffs' motion for a preliminary injunction enjoining construction of the new U.S. Attorney's Office Building.

the instant motion. The basis for the underlying suit and motions for preliminary injunction is, and was, a claim by plaintiffs, all of whom are residents of the area surrounding the construction site, that defendants did not comply with § 102(2)(C) of the National Environmental Policy Act, 42 U.S.C. § 4332 (2)(C), in that they failed to prepare a detailed environmental impact statement. This Court agreed with defendants, on the first motion, that the General Services Administration (hereinafter "GSA"), the agency responsible for the construction of the MCC, had properly determined that a detailed statement was not necessary because the project did not significantly affect the quality of the human environment and, thus, denied plaintiffs' motion. *Hanly* v. *Mitchell*, 72 Civ. 716 (S.D.N.Y. Mar. 22, 1972).

The Second Circuit Court of Appeals reversed that portion of this Court's decision concerning the MCC and remanded the action for a proper determination by GSA, taking into account all relevant factors of whether the MCC would significantly affect the quality of the human environment. *Hanly* v. *Mitchell*, 460 F.2d 640 (2d Cir.), *cert. denied*, 409 U.S. 990 (1972) (hereinafter "*Hanly I*").

A second statement was prepared and submitted by GSA which again concluded that a detailed statement was not required. Once again, this Court denied plaintiffs' motion for a preliminary injunction. *Hanly* v. *Mitchell*, 72 Civ. 716 (S.D.N.Y. Aug. 7, 1972). On appeal, the Second Circuit carefully examined the second preliminary statement. Although the Court found that, on the whole, GSA did a creditable job, it also held that GSA had failed to adequately explore certain environmental factors, that plaintiffs had

challenged certain findings of fact and that plaintiffs were not afforded a proper opportunity to adduce evidence in opposition to GSA's findings. *Hanly* v. *Kleindienst*, 471 F.2d 823 (2d Cir. 1972) (hereinafter "*Hanly II*"). Furthermore, this Court was instructed to issue a preliminary injunction restraining further construction of the MCC should GSA conclude that a detailed environmental impact statement was required. On the other hand, if GSA were to reaffirm its previous findings, this Court, upon plaintiffs' motion, was to determine whether preliminary injunctive relief should issue.

GSA has now reaffirmed its previous findings in a supplemental report filed with the Court on April 6, 1973, and plaintiffs have now moved for a preliminary injunction.

Plaintiffs' Motion

In order to prevail on their motion, plaintiffs must show impending irreparable damage and a probability of success on the merits of their claim. *See, e.g.*, *Gulf & Western Industries, Inc.* v. *The Great Atlantic & Pacific Tea Co., Inc.*, Docket No. 73-1223 (2d Cir. Mar. 12, 1973). This Court has little doubt, defendants' arguments notwithstanding, that plaintiffs will suffer irreparable damage if their motion is not granted. The question before this Court is, then, whether it is probable that defendants have violated the requirements of 42 U.S.C. § 4332(2)(C), *i.e.*, have they improperly failed to prepare a detailed environmental impact statement?

Section 4332(2)(C) states, in pertinent part:

"The Congress authorizes and directs that, to

> the fullest extent possible . . . (2) all agencies of the Federal Government shall—
>
> * * * *
>
> "(C) include in every major recommendation or report on proposals for legislation or other major Federal actions *significantly affecting the quality of the human environment*, a detailed statement by the responsible official on—
>
> "(i) the environmental impact of the proposed action. . . ." (Emphasis added.)

In *Hanly II*, the Court of Appeals determined that review of the alleged failure to comply with this section required a two-stage analysis: (1) defining the term "significantly" as a question of law; and (2) determining whether the MCC will have a significantly adverse impact as a question of fact.

With regard to the first issue, it was determined that the agency in charge—here, GSA—should review the construction of the MCC in the light of at lease two factors: (1) the adverse environmental effects of the MCC in excess of those created by existing uses in the community, and (2) the cumulative adverse environmental effects of the MCC in the community. This Court has carefully reviewed the supplemental findings to ensure that this standard was correctly employed and concludes that GSA has effected full compliance with the direction of the Court of Appeals. All factors remanded for reconsideration were first evaluated for any adverse environmental impact. Where it was determined that a potential for adverse impact existed—*e.g.*, a rise in crime in the area, increased contact between children

and persons involved in the Community Treatment Center—GSA evaluated the cumulative impact of the MCC. Its conclusion with regard to all factors was that no significant impact would result from construction of the MCC.

The next area of inquiry for this Court is, then, whether that conclusion is factually sound. The Court of Appeals, in *Hanly II*, determined that the appropriate criterion of review is the "arbitrary, capricious" standard as applied in *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971). That court employed a multi-stage review. The first question—whether GSA has acted within the scope of its authority in making the determination—has already been answered in the affirmative by the Court of Appeals in *Hanly I*. *Hanly* v. *Mitchell*, *supra*, 460 F.2d at 645. The second question is whether GSA's preliminary evaluation

> ". . . was not 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.' . . . To make this finding the court must consider whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment . . . . Although this inquiry into the facts is to be searching and careful, the ultimate standard of review is a narrow one. *The court is not empowered to substitute its judgment for that of the agency.*" *Citizens to Preserve Overton Park* v. *Volpe*, *supra*, 401 U.S. at 416. (Emphasis added.) (Citations omitted.)

This review is to be based on the full administrative record before GSA at the time it made its decision. *Citizens to Preserve Overton Park* v. *Volpe*, *supra*, 401 U.S. at 420. Furthermore, this Court will restrict

itself to a review of only those environmental factors which the Court of Appeals remanded for further consideration since that Court was apparently satisfied that the findings with respect to the other factors were not "arbitrary or capricious".

The report begins with a finding that the MCC will not now, or in the future, provide a drug maintenance program. The only treatment available will be an internal detoxification component for prisoners who are alcoholic or chemical abusers. This finding is based upon the advice of the Bureau of Prisons, which will operate the MCC. Since plaintiffs have not submitted any evidence contradicting this statement, the Court concludes that the finding is not arbitrary or capricious.

The report next discusses the visibility of the detainees vis-a-vis area residents and concludes that there will be virtually no opportunity for such contact since all prisoner vans entering and leaving the MCC will be loaded and unloaded within the interior of the building. This finding is supported by the architectural firm responsible for the design of the MCC. Once again, although plaintiffs challenge the validity of GSA's finding, they have submitted absolutely no evidence to rebut it. Since GSA's factual determination seems reasonable in light of the record before it, this Court cannot say that it is arbitrary or capricious.

Indeed, this motion is replete with plaintiffs' unsupported challenges to GSA's findings. More specifically, GSA's finding of no adverse environmental impact with regard to the factors of (1) increased burdens on community medical facilities, (2) zoning, (3) public officials' prior knowledge of the project, (4) distance between buildings, (5) effect on light

and air, (6) visibility of rooftop recreation area, and (7) nonresident and observation study is supported by the record and uncontradicted by plaintiffs' evidence. While the Court will not detail those findings it is obvious from the administrative record that they are not arbitrary or capricious. There are, however, several factors which deserve further comment.

First, the report concludes that there will be little, if any, rise in crime in the area of the MCC. GSA has conducted a study of the rise in crime in other areas of the city which house detention facilities and has concluded that there is no correlation between the presence of such facilities and a higher crime rate. Furthermore, GSA has compared the crime rate for certain areas before and after construction of detention facilities (where those statistics were available) and could find no positive correlation between such construction and a rise in the crime rate for those areas. These findings are supported by New York Police Department and Bureau of Prisons statistics. While it is true that these statistics do not guarantee that crime will not increase in the area of the MCC, they do serve as a foundation in fact for such a finding and plaintiffs' unsupported allegations to the contrary do not convince this Court that the findings are arbitrary or capricious.

With regard to the architecture of the MCC, GSA has concluded that it is in harmony with the entire architectural concept of the civic center area. This finding is supported by a letter from the firm responsible for the design of the MCC. The Court concedes that while genuine disagreement may exist as to the aesthetic value of the present design, it is clear that GSA's finding is not arbitrary or capricious.

Lastly, the report concludes that there will be little chance for contacts between detainees, their visitors and children attending schools in the area. GSA bases this finding upon the location of schools in the area, the most likely routes which students will take to those schools, the number of visitors expected, the number of detainees expected to participate in the community treatment center and the restrictions placed upon their mobility within the community. Once again, it might be argued that GSA's determination is merely a self serving speculation. It is, nonetheless, a speculation with foundation in fact and not arbitrary, capricious or without reason.

It appears to this Court, as it apparently has to the Court of Appeals, *Hanly* v. *Kleindienst*, *supra*, 471 F.2d at 753, that plaintiffs' objections to the MCC are primarily psychological. A reading of the transcript of the January 30 hearing, and the papers submitted before and after the hearing, indicate that the members of the community feel that they have been lied to by federal, state and city officials; that they were promised, in return for investing in the Chatham Towers and Chatham Greens cooperative apartments, parks and other community facilities on what is now the site of the Courthouse Annex and the new Police Department Headquarters. None of those charges are documented and, even if they were, that issue is not before this Court. The scope of review is a narrow one and plaintiffs have failed to show that the supplemental findings are arbitrary or capricious. Furthermore, their fully justified complaint that they were not consulted with regard to, or allowed to submit evidence in opposition to, the construction of the MCC has been corrected by the Court of Appeals.

In *Hanly II*, the Second Circuit held that

> ". . . before a preliminary or threshold determination of significance is made the responsible agency must give notice to the public of the proposed major federal action and an opportunity to submit relevant facts which might bear upon the agency's threshold decision." *Hanly* v. *Kleindienst, supra*, 471 F.2d at 836.

GSA, in attempting to comply with those directions, both mailed and published notices of a "public meeting" to be held on January 30, 1973 for the purpose of receiving evidence relating to the effect of the MCC on the human environment. At that meeting some twenty-five persons made statements in opposition to the construction of the jail. In addiiton, written statements were received by the GSA both during and after the proceedings.

Plaintiffs now claim that the "hearing" was not in accordance with the *Hanly II* opinion for two reasons: (1) the members of the panel were not impartial and disinterested parties and (2) there was no opportunity for cross-examination of witnesses. As to the first stated objection, plaintiffs argue that a panel composed of representatives from GSA, the Federal Bureau of Prisons, and the Regional Commissioner of Public Buildings is obviously biased in favor of the construction of the MCC. As to the second objection, plaintiffs claim that the failure to produce witnesses in favor of the project and thus subject them to cross-examination is evidence that the "hearing" was little more than an attempt to appease opponents of the project.

This Court does not, however, read the *Hanly II* opinion as requiring the type of adversary proceedings which plaintiffs feel they are entitled to.

> "We do not suggest that a full-fledged formal hearing must be provided before each such determination is made, although it should be apparent that in many cases such a hearing would be advisable for reasons already indicated. The necessity for a hearing will depend greately upon the circumstances surrounding the particular proposed action and upon the likelihood that a hearing will be more effective than other methods in developing relevant information and an understanding of the proposed action. *The precise procedural steps to be adopted are better left to the agency, which should be in a better position than the court to determine whether solution of the problems faced with respect to a specific major federal action can better be achieved through a hearing or by informal acceptance of relevant data.*"

GSA, acting within the discretion accorded to it by the Court of Appeals, chose not to hold "formal" hearings but rather to hold a public meeting at which concerned members of the community could express their views and submit evidence in opposition to the MCC. In this regard, GSA clearly fulfilled the intended two-fold object of such proceedings, *i.e.*, to allow the community to present its views of the effect of the project on the human environment and to create a record reviewable by the courts. Certainly, if the Court of Appeals felt that it was not in a better position that GSA to determine the precise procedural steps to be taken in fulfillment of those objectives, neither can this Court be in such a position.

Since the "hearing" was not intended to be an adversary-type proceeding in which a decision would be made only upon the evidence there adduced, there

was no need for a neutral panel. Indeed, it is only logical that those who are charged with the responsibility of making the determination be present to hear firsthand the objections to the project. There is no suggestion of any impropriety other than the composition of the panel and, indeed, there could be none since all evidence proffered was accepted without reservation. Furthermore, since the object of the meeting was merely to collect information from the community, GSA was under no obligation to present witnesses and the lack of an opportunity to cross-examine such witnesses does not run afoul of *Hanly II*.

One final comment is required in connection with plaintiffs' motion for a preliminary injunction. For the first time since these proceedings were commenced, plaintiffs now argue that GSA has failed to consider any beneficial effects of the MCC as required by the Council on Environmental Quality Guidelines, 36 Fed. Reg. 7724, 7725 (1971), and that, therefore, an injunction should issue. Those guidelines, however, refer to the actual preparation of the detailed impact statement and not the initial assessment. Furthermore, the guidelines are permissive rather than mandatory.

Defendants' Motion

Defendants have moved for summary judgment as to plaintiffs' claim for injunctive relief. Plaintiffs oppose the motion on the grounds that two issues of fact remain to be determined: (1) whether the MCC will significantly affect the quality of the human environment and (2) whether GSA's determination was arbitrary or capricious. The first "issue" is nonexistent. It is not up to this Court to determine

whether the MCC will significantly affect the quality of the human environment. That determination is to be, and has been, made by GSA. The narrow question before the Court is whether that determination was arbitrary or capricious.

In deciding the second issue, the Court is to base its review on the full administrative record before GSA. *Citizens to Preserve Overton Park* v. *Volpe*, *supra*, 402 U.S. at 420. There is no issue of fact in this case as to what that record consisted of; the Court has the full record before it now. Plaintiffs are not entitled to bring in additional witnesses at a trial on the merits. The Court of Appeals provided them an opportunity for the presentation of such witnesses at the public meeting conducted by GSA. This Court holds then, for the reasons given *supra*, that GSA's determination that the MCC does not significantly affect the quality of the human environment is not arbitrary or capricious.

Therefore, and for the foregoing reasons, plaintiffs' motion for a preliminary injunction is denied and defendants' motion for summary judgment dismissing plaintiffs' claim for injunctive relief is granted.

Submit order in accordance with this opinion on five (5) days notice.

Dated: New York, New York
June 14, 1973

CHARLES H. TENNEY
U.S.D.J.

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SUPREME COURT, U. S.

APR 4 1974

MICHAEL RODAK, JR., CLERK

In The

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October Term, 1973

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DENIS HANLY, et al.,

Petitioners,

vs.

WILLIAM B. SAXBE, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1973

No. 73-913

DENIS HANLY, ET AL., PETITIONERS

v.

WILLIAM B. SAXBE, ET AL.,

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

I

Petitioners' new question - not presented in the petition herein - involving (a) a conflict between the Court of Appeals for the Second Circuit and the Court of Appeals for the Fifth Circuit as to the standard governing judicial review of agency determinations under NEPA, with each court relying upon Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, and (b) a conflict, resulting from said reliance, between, on the one hand, the holding of one or the other Court of Appeals and, on the other, Citizens to Preserve Overton Park, supra.

Because of the extraordinary importance of the question in the administration of NEPA, as well as in judicial review

of agency determinations under NEPA, together with the fact that the question is likely to recur so long as NEPA remains in force and effect, petitioners beg leave, pursuant to the authority of the cases cited in Stern & Gressman, Supreme Court Practice (4th Ed., 1969), pp. 298-299, to add to the three questions which appear in the petition (3-3d), a new question, not set forth in the petition herein, involving (a) a conflict between the Court of Appeals for the Second Circuit (Hanly v. Kleindienst, 484 F 2d 448, 449, and the Court of Appeals for the Fifth Circuit (Save Our Ten Acres, 472 F 2d 463, 465-467) as to the standard regulating judicial review of agency determinations under NEPA, with each court relying for its holding on Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, and (b) a conflict,

resulting from said reliance, between, on the one hand, the decision of one or the other Court of Appeals and Citizens To Preserve Overton Park, supra, on the other hand.

The new question - which is the fourth question presented by petitioners - may be stated in its dual aspect thus:

4 (a) Where a District Court is called upon to review the propriety of (a) a determination by a federal agency that a proposed federal action does not "significantly affect the quality of the human environment" within the meaning of those words in NEPA, and (b) the agency's resulting determination that an environmental impact statement need not be filed, is the standard of review the "arbitrary or capricious" one (adhered to by the Court of Appeals for the Second Circuit),

or the stricter standard of reasonableness, consistent with the Congressional declaration of policy in NEPA that "to the fullest extent possible, the policies, regulations and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in" NEPA (adhered to by the Court of Appeals for the Fifth Circuit)?

4 (b) Since each said Court of Appeals relies for its holding on Citizens To Preserve Overton Park v. Volpe, 401 U.S. 402, and said reliance must be misplaced in the case of one or the other holding, is the holding of the Court of Appeals for the Second Circuit or that of the Court of Appeals for the Fifth Circuit in conflict with Citizens To Preserve Overton Park v. Volpe, supra?

Facts, and reasons for granting the writ as to the above questions.

The District Court (Tenney, D.J.) held that GSA, in reaffirming its previous findings that the jail (as well as the office building) would not significantly affect the quality of the human environment, did not act arbitrarily or capriciously (Appendix attached to respondents' memorandum, p. 11, second complete paragraph, concluding sentence; p. 12, first complete sentence, and first complete paragraph, concluding sentence; p. 13, penultimate sentence; p. 17, first complete paragraph, concluding sentence).

In applying the "arbitrary or capricious" standard of review, Judge Tenney relied upon Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971)

(Appendix attached to respondents' memorandum, pp. 10 and 17).

In affirming the determination of the District Court, the Court of Appeals expressed its approval of Judge Tenney's use of the "arbitrary or capricious" standard of review, saying,

> "Judge Tenney held, quite properly we think, that the General Services Administration (GSA) did not act arbitrarily or capriciously in determining, by a supplemental report filed April 6, 1973, reaffirming previous findings, that the Annex* would not significantly affect the

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*The Annex includes both the jail and office building. Hanly v. Mitchell, 460 F 2d, at pp. 642-643.

quality of the human environment under the National Environmental Policy Act (NEPA), 42 U.S.C. section 4321, and more specifically section 4332(2)(C), as well as under the decisions of this Court in Hanly v. Mitchell, 460 F 2d 640 (2d Cir.), cert. denied, 409 U.S. 990, 93 S. Ct. 313, 34 L. Ed 2d 256 (1972), and Hanly v. Kleindienst, 471 F 2d 823 (2d Cir. 1972), cert. denied, 412 U.S. 908, 93 S.C.A. 2290, 36 L. Ed. 2d 974 (1973)."

Hanly v. Kleindienst, 484 F 2d 448, 449, at 449, and Appendix attached to petition, 8a-9a.

While the Court of Appeals, in

applying the "arbitrary or capricious" standard of review, did not state that it was, like Judge Tenney, relying upon Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971), supra, it is reasonable to suppose that it did so, since the Court of Appeals, in its previous determination, Hanly v. Kleindienst, 471 F 2d 823 (1972) - which the Court reaffirmed in 484 F 2d, at p. 449) - had also applied the "arbitrary or capricious" standard, and in doing so, had expressly relied upon Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, supra.

However, in Save Our Ten Acres v. Kreger, 472 F 2d 463 (5 Cir., 1973), involving judicial review of the propriety of a determination by a federal agency (GSA) to proceed with the construction of a proposed project (a federal office building in down-

town Mobile, Alabama) without filing an environmental impact statement, on the ground that the building would not significantly affect the quality of the human environment, the Court of Appeals for the Fifth Circuit expressly rejected the concept employed by the Court of Appeals and District Court in the case at bar that the standard of review was the "arbitrary or capricious" one, but held that the standard or test was whether the agency's determination was reasonable in the light of the Congressional declaration of policy in NEPA (42 U.S.C. section 4332, opening sentence) that "to the fullest extent possible, the policies, regulations and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in" NEPA. 472 F 2d at pp. 465-7. In so holding, the

Court, curiously enough, expressly relied, in material part, upon Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, supra, the very authority relied upon by the Court of Appeals and District Court in the case at bar in holding that the applicable standard of review was the "arbitrary or capricious" one.

Several months after its decision in Save Our Ten Acres v. Kreger, 472 F 2d 463, supra, the Court of Appeals for the Fifth Circuit expressly reaffirmed the rationale and holding of that determination - more particularly, the correctness of the standard of judicial review of agency action under NEPA employed in that case. Hiram Clarke Civic Club Inc. v. Lynn, 476

F 2d 421, 422, 424-425.*

The conflict between the Court of Appeals for the Second Circuit and the Court of Appeals for the Fifth Circuit as to the applicable standard of review of agency determinations under NEPA, as well as the conflict between those courts as to the meaning, scope and effect of Citizens to Preserve Overton Park, supra, together with the resulting conflict between, on the one hand, the holding of one or the other of those courts, and, on the other, Citizens to Preserve Overton Park, supra, is of such importance in the administra-

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*Tested by the standard of review laid down in Save Our Ten Acres, supra, and Hiram Clarke Civic Club, supra, the determination of GSA in the case at bar - and, correspondingly, the determinations of the District Court and Court of Appeals upholding GSA - cannot, petitioners submit, stand.

tion of NEPA, as well as in judicial review of agency determinations under NEPA, and is so likely to recur so long as NEPA remains in force and effect, that the conflicts urgently require resolution, and certiorari, it is respectfully submitted, should be granted to accomplish said objective.

II

RESPONDENTS HAVE NOT OVERCOME PETITIONERS' SHOWING OF THE EXISTENCE OF A CONFLICT AMONG THE COURTS OF APPEAL AND THE DISTRICT COURTS CONCERNING THE MEANING OF THE KEY LANGUAGE IN NEPA, AND THAT CONFLICT CALLS FOR THE GRANT OF CERTIORARI TO RESOLVE IT (replying to respondents' memorandum, pp. 1-2, 3-4, and in further support of petition, pp. 3-3a, question "1", and 43-52).

Respondents have, in their memorandum, failed to negative the existence of a conflict among various courts of appeal, as well as among divers district

courts (described, Pet., 3-3a, 43-52), concerning the question - and here we state the question somewhat more precisely than the way it is phrased in the petition ("Questions Presented", question "1", pp. 3-3a; "Reasons for Granting the Writ", pp. 43-44) - whether the language in the National Environmental Policy Act (NEPA, section 102(2)(C), 42 U.S.C. section 4332(2)(C), "major Federal actions significantly affecting the quality of the human environment" (which require environmental impact statements) constitutes (1) a unitary or single-test standard: i.e., the use of both "major" and "significantly affecting", etc. is merely for emphasis, so that a "major" federal action ipso facto is one "significantly affecting the quality of the human environment", and thus requires an environmental impact

statement, and, conversely, a federal action which has such an environmental effect is ipso facto "major" in character, and thus also requires such a statement; or (2) whether the quoted statutory language represents a dual or two-test standard: i.e., the action must be shown to be both "major" in character (the term "major" referring to such matters as the cost of the project, the amount of the planning which preceded it, and the time required to complete it; see Hanly v. Mitchell, 460 F 2d, at p. 644), and, apart from being shown to be major, must also be shown to be one "significantly affecting the quality of the human environment" - all in order to require the filing of an environmental impact statement.

Respondents (Memorandum, p. 3) attempt to counter petitioners' claim of

the existence of such a conflict by contending, first, that the cases cited by petitioners as supporting the unitary or single-test standard (Pet., pp. 48-50) "simply assume without discussion that the federal action involved is one that requires a finding regarding environmental impact." But that fact, in the light of the additional fact that in each of those cases, the federal action was admittedly "major" in character, only proves the correctness of petitioners' position: that is, since under the unitary test standard, a "major" federal action is ipso facto one which significantly affects the quality of the human environment (thus requiring an environmental impact statement), it would follow that the cases, as respondents put it, "simply assume without discussion that the federal action is one

that requires a finding regarding environmental impact." Thus, respondents' above-quoted description of the ratio decidendi of these cases, far from refuting the existence of the conflict, only serves to establish it.

Secondly, respondents assert, "Petitioners do not explain why this alleged conflict is significant" (Memorandum, p. 3). It is significant because (a) respondents have conceded that the construction of the jail is a "major" federal action (Hanly v. Mitchell, 460 F 2d at p. 644), and (b) under the unitary test standard described above, a "major" federal action is one "significantly affecting the quality of the human environment," which thus requires the filing of an environmental impact statement.

Third, and finally, respondents

argue that, insofar as concerns the case at bar, the conflict is without relevance because, as respondents assert, "both courts below found that GSA did properly consider (the) question whether the construction of the correctional center would significantly affect the quality of the human environment, and concluded that it would not" (Memorandum, pp. 3-4).

The argument, we submit, misses the point. If, under the unitary test standard, a "major" federal action is one "significantly affecting the quality of the human environment", which requires an impact statement, then, the Court of Appeals' finding that GSA had conceded that the project is a "major" federal action (460 F 2d, at p. 644) and that Court's finding that, nevertheless, the action is not one significantly affecting the qual-

ity of the human environment (and thus an impact statement is not required), represent mutually contradictory and imcompatible findings. This fact, in turn, renders the judgment sought to be reviewed (App., 1a-4a; see opinion, Appendix attached to petition, 5a-13a, 484 F 2d 448) void for vagueness, a doctrine applicable to civil, as well as criminal, cases. Boutilier v. Immigration and Naturalization Service, 387 U.S. 118, 124, to be read with United States v. Cardiff, 344 U.S. 174.

It thus appears that respondents have failed to overcome the showing in the petition of the existence of a conflict among the courts of appeal and the distict courts concerning the meaning of a key provision of NEPA. That conflict, it is respectfully submitted, suggests that certiorari should be granted to resolve it.

III

THE LETTERS SENT BY GSA TO GOVERNOR ROCKEFELLER AND MAYOR LINDSAY CONTAIN DUPLICATE FINDINGS BY GSA UNDER THE INTERGOVERNMENTAL COOPERATION ACT (ICA) AND RELATED REGULATIONS WHICH ARE TANTAMOUNT TO DUAL DETERMINATIONS UNDER NEPA THAT THE PROJECT WILL SIGNIFICANTLY AFFECT THE QUALITY OF THE HUMAN ENVIRONMENT, SO THAT AN ENVIRONMENTAL IMPACT STATEMENT IS REQUIRED. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE QUESTION WHETHER SUCH A FINDING UNDER ICA, ETC. IS EQUIVALENT TO SUCH A DETERMINATION UNDER NEPA (replying to res-

pondents' memorandum, p. 4, and in further support of petition, pp. 3a-3d, question "2", and 53-66).

The point heading above is self-explanatory.

IV

RESPONDENTS HAVE FAILED TO ANSWER PETITIONERS' SHOWING THAT GSA DEPRIVED PETITIONERS OF DUE PROCESS (replying to respondents' memorandum, pp. 4-5, and in further support of petition, 3d, question "3", and 67-78).

The point heading above is self-explanatory.

V

THE RECENT INCIDENT AT THE FEDERAL HOUSE OF DETENTION IN NEW YORK - WHICH THE PROPOSED PRISON IS TO REPLACE - IN WHICH ARMED CONVICT INMATES TOOK GUARDS AS HOSTAGES IN AN ATTEMPT TO BREAK OUT, DRAMATICALLY ESTABLISHES THAT THE PROPOSED PRISON, BORDERING A POPULOUS RESIDENTIAL COMMUNITY, WILL SIGNIFICANTLY AFFECT THE QUALITY OF THE HUMAN ENVIRONMENT, THUS REQUIRING AN ENVIRONMENTAL IMPACT STATEMENT PRIOR TO CONSTRUCTION AND OCCUPANCY OR COMPLETION THEREOF.

Counsel for petitioners recently

forwarded to the Court and counsel for the government newspaper articles concerning the incident which took place within the past two weeks at the Federal House of Detention in Manhattan, which the proposed prison herein is designed to replace. Three convicted bank robbers, being held at the prison, who had managed somehow to obtain guns, seized four prison guards and held them hostage in a desperate attempt to break out. 150 heavily armed police and FBI agents waited outside while the drama inside the prison unfolded. Fortunately, the convicts surrendered and the hostages were released.

The proposed prison herein, which will replace the Federal House of Detention, borders a populous residential community, which includes thousands of the elderly and young. The possibility of a similar

episode taking place at the new prison, and an armed confrontation between armed convict inmates, desperately intent upon gaining their freedom, and a brigade of armed police and FBI agents, desperately intent upon preventing them from doing so, with the accompanying danger of a wild and unpredictable "shoot-out", resulting in injury and death, to police, FBI agents, residents of the neighborhood, passers-by, etc. - all this only serves to dramatize the fact that the proposed prison will significantly affect the quality of the human environment, and that, before construction and occupancy begin or are completed, should an environmental impact statement be filed, so that an informed determination may be made as to whether to proceed or not.

CONCLUSION

A writ of certiorari should issue to review the judgment of the Court of Appeals for the Second Circuit.

Respectfully submitted,

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